87 876 (1)

Supreme Court, U.S.
FILED
NOV 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONNIE O. KITCHENS, et al.,
Petitioners,

v.

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES OF AMERICA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP FREDERICK SCHUSTER, II
Counsel of Record
ROGER FREDRICK DIERKING
Attorneys for Petitioners
1500 N.E. Irving Street, Suite 540
Portland, OR 97232
(503) 231-7765

November 12, 1987

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 9711

157 pp

QUESTIONS PRESENTED

1. Are persons designated as biological fathers of children born out-of-wedlock constitutionally entitled to notice of actions mandated by federal Social Security AFDC regulations which implicate their rights at the Title IV-A application for assistance stage?

2. Is the Secretary of Health and Human Services, rather than the states, responsible, under the AFDC statutes and principles of cooperative federalism, for directing that notice be provided to these designated biological fathers?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The plaintiffs in the district court case were the appellants in the court of appeals. The named plaintiffs in Kitchens, et al v. Bowen, et al were:

Ronnie O. Kitchens
Michael J. Callaghan
Gordon D. O'Dell
Robert W. Dickinson
Glenn D. Rogie
Gerald E. Ryon
John F. Moore

The defendants in the district court were the appellees in the court of appeals. The named defendants in Kitchens, et al. v. Bowen, et al were:

Otis R. Bowen, Secretary, Department of Health and Human Services, United States of America

Keith Putman, Administrator, Adult and Family Services Division, Department of Human Resources, State of Oregon

Jim Hunter, Administrator, Support Enforcement Division, Department of Justice, State of Oregon

TABLE OF CONTENTS

	page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS IN THE COURT BELOW.....	ii
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED.....	3
STATEMENT.....	4
1. Introduction.....	4
2. The AFDC Title IV-A Program Is National In Scope.....	9
3. The State Child Support Enforcement - Title IV-D - Proceedings Are Both Interstate and Intrastate In Character.....	11
4. The Proceedings In This Case.	15
REASONS FOR GRANTING THE WRIT.....	20
I. The Conflicts Are Substantial.	20
II. The Issues Have National Importance.....	23

A. Federal Regulations Implicate Substantial Fifth and Fourteenth Amendment Due Process Property Rights of Designated Fathers at The Title IV-A AFDC Application For Assistance Stage..... 24

B. Federal Regulations Implicate Substantial Fifth and Fourteenth Amendment Due Process Personal Interests of Designated Fathers at The Title IV-A AFDC Application For Assistance Stage 28

C. Federal Regulations Fail To Afford Designated Fathers Their Fifth and Fourteenth Amendment Procedural Due Process Rights to Notice... 32

III. The Federal Action Test Employed By The Court of Appeals To Dismiss This Case Conflicts With Decisions Of This Court and With Other Courts of Appeals..... 40

IV. The Younger Abstention Doctrine Is Inapplicable..... 50

CONCLUSION..... 52

APPENDICES

Appendix A: Opinion of the Ninth Circuit Court of Appeals A-1

Judgment Order of the Ninth Circuit Court of Appeals..... A-23

Appendix B: Opinion of the United States District Court for the District of Oregon. B-1

Order of the United States District Court for the District of Oregon. B-10

Judgment of the United States District Court for the District of Oregon..... B-11

Appendix C: U.S. Magistrate's Findings and Recommendations C-1

Appendix D: Constitutional Provisions D-1

Statutory Provisions D-2

Regulatory Provisions D-10

TABLE OF AUTHORITIES

CASES

page

Abbott Laboratories v. Gardner, 387 US 136 (1967)..... 41

Armstrong v. Manzo, 380 US 545, 107 Sp.Ct. Rptr 3001 (1965)..... 27

Beck v. Communications Workers of America (C.W.A.), 776 F2d 1187 (4th Cir. 1985)..... 45,46

Blum v. Yaretsky, 547 US 991 (1982)..... 18,19,40,43,46

Bowen v. Yuckert, 482 US ___, 96 LEd2d 119 (1987))..... 22,37,47

Caban v. Mohammed, 441 US 380 (1979)..... 28

Califano v. Sanders, 430 US 99 (1977)..... 41

City of Claremont v. Truell, 126 N.H. 30, 489 A2d 581 (1985)..... 27

Clearfield Trust Co. v. United States, 318 US 363 (1943)..... 49

Dandridge v. Williams, 397 US 471 (1970)..... 23

Duncan v. Peck, 752 F2d 1135 (6th Cir. 1985)..... 46

Finnerty v. Boyett, 469 S2d 287, (La.App. 2d Cir 1985)..... 30

Fuentes v. Shevin, 407 US 66 (1972) 33

Goldberg v. Kelly, 397 US 254 (1970)..... 32

Hillsborough County v. Automated Med. Labs., 471 US 707 (1985)..... 48,49

In Re Baby Girl Eason, ___ Ga ___, 358 SE2d 459 (1987)..... 30

Juidice v. Vail, 430 US 327 (1977) 50

King v. Smith, 392 US 309 (1968)... 48

Lehr v. Robertson, 463 US 248 (1983)..... 4,21,28,29,30,35

Little v. Streater, 452 US 1 (1981) 33

Lloyd v. Lloyd, 731 F2d 393 (7th Cir. 1984)..... 46

Lugar v. Edmondson Oil Co., Inc., 457 US 922 (1982) 18,19,22,40,42,44,45,46

Lukhard v. Reed, 481 US ___, 95 LEd2d 328 (1987)..... 9,48

Mathews v. Eldridge, 424 US 319 (1976)..... 19,34

Mitchell v. W.T. Grant Company, 416 US 600 (1974)..... 36

Moore v. City of East Cleveland, Ohio, 431 US 494 (1977)..... 31

New York State Dept. of Social Services v. Dublino, 413 US 405 (1973)..... 49

Pennzoil Co. v. Texaco, Inc., 481 US ___ (95 LEd2d 21)(1987) 51

Rendell-Baker v. Kohn, 457 US 830 (1982)..... 18,19,40,43,46

Rivera v. Minnich, 483 US___, 97 LEd2d 473 (1987)..... 25

Rodriguez v. Compass Shipping Co., Ltd., 451 US 596 (1981)..... 47

Roudybush v. Zabel, 813 F2d 173 (8th Cir. 1987)..... 46

Santosky v. Kramer, 455 US 745 (1982)..... 31

Stanley v. Illinois, 405 US 645 (1972)..... 4,28,31

United Mine Workers of America v. Gibbs, 383 US 715 (1966)..... 51

Younger v. Harris, 401 US 37 (1971) 50

CONSTITUTION

United States Constitution

Article VI, Clause 2..... 3,50
Fifth Amendment..... 3,14,15,16,24,32
Fourteenth Amendment..... 3,16,24,32

STATUTES

Act of August 14, 1935, 49 Stat. 627 9
42 USC §§ 601-615..... 9

Act of January 4, 1975, 88 Stat. 2351 12
42 USC §§ 651-667..... 12

42 USC §§ 601..... 3,23
602(a)(4)..... 3,39,48
602(a)(5)..... 3,37
602(a)(7)(A)..... 3,11,27,28,35
602(a)(11))..... 3,39,48
602(a)(26)(A)..... 3,10
602(a)(26)(B)..... 3,11
653(a)..... 3,39
654(4)(A)..... 3,13,33
654(9)(A)..... 3,13
666(a)(5)..... 3,13,25
1302..... 3,37
1983..... 2,13,15

28 USC §§ 1254(1) 3
1331..... 2,3,15,16,18,31,51
1343..... 2,15
2201-2202..... 2,15

5 USC §§ 701-706..... 2,15
706(2)(A)(B)..... 3,37

REGULATIONS

45 CFR §§ 205.10(a)(1)..... 4,49
206.10(a)(4)(7)..... 4,9,49
232.11(a)(1)..... 4,10
232.12(a)(1)(2)..... 4,11
232.43(a)(g)(h..... 4,10,37,49
232.45..... 4,49
232.49..... 4,11,33
233.20(a)(1)..... 4,11
235.70..... 4,49
302.31..... 4,11,33,46
302.50..... 4,10,46
303.4..... 4,46
303.5..... 4,11,33,46
303.7(a)(1)(2)(3)..... 4,13,14
305.24(b)..... 4,13,25

LEGISLATIVE HISTORY

S. Report 93-1356, 93rd Cong. 2nd Sess. 8133, 8146-8155 (1974)..... 12

S. Report 98-387, 98th Cong. 2nd Sess. 2425 (1984)..... 28

TEXTS

E. Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson, 45 Ohio St. L.J. 313 (1984)..... 30

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RONNIE O. KITCHENS, et al., Petitioners

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES OF AMERICA, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Ronnie O. Kitchens, et. al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 20, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 825

F2d 1337, and is reprinted in Appendix A hereto.

The memorandum decision of the United States District Court for the District of Oregon (Redden, D.J.) has not been reported. It is reprinted in Appendix B hereto. The Findings and Recommendation of the U.S. Magistrate is reprinted in Appendix C hereto.

JURISDICTION

The petitioners invoked 28 USC §§ 1331, 28 USC §§ 2201-2202, 5 USC §§ 701-706, 28 USC § 1343 and 42 USC § 1983 in bringing this suit in the District Court for the District of Oregon. On June 25, 1986, the Oregon District Court dismissed petitioners' action.

On petitioners' appeal, the Ninth Circuit Court of Appeals, on August 20, 1987, entered a judgment and an opinion

affirming the Oregon District Court order directing that petitioners' action be dismissed.

The jurisdiction of this Court to review the judgment of the Ninth Circuit Court of Appeals is invoked under 28 USC §§ 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Supremacy Clause and Fifth and Fourteenth Amendments of the United States Constitution, the Administrative Procedure Act, 5 USC §§ 706(2)(A)(B) and 28 USC §§ 1331, the Aid to Families with Dependent Children (AFDC) Act, 42 USC §§ 601 and 602(a)(1), (2),(3),(4),(5),(7)(A),(11), (26)(A)(B), the Child Support Enforcement (CSE) Act, 42 USC §§ 653(a), 654(4)(A),(9)(A), 666(a)(5) and 1302, the Civil Rights Act, 42 USC §§ 1983, and the pertinent regulations im-

plementing the AFDC and CSE Acts by the Secretary of Health and Human Services, 45 CFR §§ 205.10(a)(1), 206.10 (a)(4)(7), 232.11(a)(1), 232.12(a)(1)(2), 242.43 (a)(g)(h), 232.45, 232.49, 233.20 (a)(1), 235.70, 302.31, 302.50, 303.4, 303.5, 303.7(a)(1)(2)(3), 305.24(b), are set forth in App. D infra, App. D-1 to D-24.

STATEMENT

1. INTRODUCTION

This Court has formulated the principles for determining the constitutional rights of biological fathers, in cases where termination of their parental rights are implicated, from Stanley v. Illinois, 405 US 645 (1972) to Lehr v. Robertson, 463 US 248 (1983). Now the opposite situation presents itself. Petitioners are among hundreds of thousands of biological fathers each year who are

involved, without their knowledge, in a governmental welfare program of cooperative federalism. Enormous conflict and confusion is being caused for out-of-wedlock children as well as biological fathers. This Social Security program, known as Aid For Families with Dependent Children (AFDC), on the one hand assists needy, dependent out-of-wedlock children. On the other hand, however, these biological fathers (hereinafter distinguished as designated fathers) are not being united with their children in an expeditious manner as Congress intended.

The program by which the government provides assistance to children and identifies and targets designated fathers for filiation prosecution is the Title IV-A AFDC application for assistance process. Congress intended for this Title IV-A pro-

gram to be a portal through which the welfare family could be strengthened. Designated fathers should be encouraged and allowed, in a non-adversarial manner, to come through this portal at this most meaningful time to exercise their opportunity interests to form lasting relationships with their children. The rights of designated fathers become implicated the moment applicants designate them on government forms as responsible for paying support to the children, and the government targets them for filiation prosecution. However, only in the limited instance where the state agency finds it necessary to investigate the applicants' claimed refusal to cooperate, is contact with designated fathers at the Title IV-A stage directed by the Secretary. But where paternity is to be established, the

Secretary has slammed the doorway of this portal upon designated fathers by failing to enact federally mandated Title IV-A notice requirements for State plans applicable to designated fathers. Because federal statutes now require that state filiation statutes of limitation be effectively abolished, these designated fathers, many of whom are totally unaware that they have become targeted by the government for filiation prosecution, must wait while their rights are held in limbo for years and sometimes decades. Then, when they are able, state Title IV-D Child Support Enforcement agencies institute adversarial filiation proceedings. By then, any semblance of effective child support enforcement and welfare recapture, consistent with these childrens' best interests, becomes a sham.

Clearly, the Secretary's regulations are unconstitutional and out of harmony with the intent of Congress and the goals of the program to promote family stability while achieving the expeditious determination of paternity and support obligations. In a program of cooperative federalism such as this, the Secretary must define the sphere of enumerated national powers in Title IV-A proceedings to enable the states to exercise their residual powers over domestic relations matters consistent with a balanced federalism. There is substantial basis for this Court to require the Secretary to align his regulations with the Constitution and the Social Security Act by promulgating regulations which ensure that designated fathers are notified of their involvement in this government program at the time

when assistance is first provided to welfare children.

2. THE AFDC TITLE IV-A PROGRAM IS NATIONAL IN SCOPE.

The AFDC program, enacted by Congress in 1935, Act of August 14, 1935, C. 531, Title IV, § 401 et seq, 49 Stat. 627, et seq, as a cooperative federal-state program to give assistance to needy children, was established in Title IV-A of the Social Security Act, 42 USC §§ 601 to 615. States must administer their assistance plans in conformity with applicable federal statutes and regulations promulgated by the Secretary. Lukhard v. Reed, 481 US ___, 95 LEd2d 328 (1987). The Secretary has provided comprehensive Title IV-A notice procedures for applicants. 45 CFR § 206.10(a)(4)(7). However, the Secretary has directed

contact with designated fathers at the Title IV-A stage only for purposes of investigating applicants' claims of "good cause" for refusal to cooperate to establish paternity. 45 CFR §§ 232.43(g)(h).

Administrative and eligibility requirements of the Secretary pertaining to Title IV-A proceedings implicate the personal and property rights of designated fathers without giving them notice. These regulations require the following: (1) assignments by applicants to the state, of support rights against the designated fathers, creating obligations owed to the states, 42 USC § 602(a)(26)(A); 45 CFR §§ 232.11(a)(1), 302.50(a)(1)(2); (2) cooperation of applicants in the indentification and location of designated fathers to establish paternity and collect support

unless "good cause" exists for refusal to do so, 42 USC § 602(a)(26)(B); 45 CFR § 232.12(a)(1)(2); (3) deciding grant amounts for needy children based on available income and resources of the children, 42 USC § 602(a)(7)(A); 45 CFR § 233.20(a)(1)(i); and (4) targeting of designated fathers by the Title IV-A AFDC process and referral to the Title IV-D Child Support Enforcement (CSE) agency for prosecution of designated fathers through paternity and support proceedings. 45 CFR §§ 232.49; 302.31(a)(1)(2); 303.5(a).

3. THE STATE CHILD SUPPORT ENFORCEMENT -- TITLE IV-D -- PROCEEDINGS ARE BOTH INTER-STATE AND INTRASTATE IN CHARACTER.

In 1975, Congress enacted the Child Support Enforcement program, Social Services Amendments of 1974, Act of January 4, 1975, Pub. L. 93-647 § 101(a) et

seq., 88 Stat. 2351, as Title IV-D of the Social Security Act, 42 USC §§ 651-667. The CSE program is a federally financed effort to assist the states with welfare recovery through efficient prosecution of paternity and child support claims. S. Rep. 93-1356, 93rd Cong., 2nd Sess. 8133, 8146-8155, (1974).

Two to fourteen years after the Title IV-A proceedings, and without prior notice of the Title IV-A proceedings, the Oregon Adult and Family Services Division filed proceedings against the petitioners to establish paternity and collect assistance support obligations of $5,477 to $22,000. These proceedings were allowed to be filed at various times because of the statute and regulations which require that the State of Oregon permit the establishment of paternity of any child prior to 18

years of age. 42 USC § 666(a)(5); 45 CFR § 305.24(b). Paternity proceedings are required to be filed in all cases except where the state Title IV-A agency determines, under the Secretary's standards, that "good cause" exists not to establish paternity. 42 USC § 654(4)(A).

Six of the petitioners' cases in the Oregon courts were intrastate situations. The Title IV-A proceedings to provide aid for the benefit of the children born out-of-wedlock occurred in Oregon where the designated fathers resided and where Title IV-D paternity and support proceedings were filed. The seventh case, involving petitioner O'Dell, was an interstate situation. The child born out-of-wedlock received Title IV-A benefits in California, and, in accordance with federal law, 42 USC § 654(9)(A), 45 CFR §

303.7(a)(1)(2)(3), the Title IV-D paternity and support collection actions were filed in Oregon where the designated father resided.

Two of the petitioners, Mr. O'Dell and Mr. Rogie, have acknowledged paternity and the state court proceedings in their cases were terminated subject to federal court rulings on their federal claims. Proceedings against two other petitioners, Mr. Callaghan and Mr. Ryon, were dismissed upon stipulation of the parties. Motions for summary judgment were granted by the State of Oregon circuit court dismissing paternity proceedings involving the other three petitioners, Mr. Kitchens, Mr. Moore and Mr. Dickinson. The circuit court rulings were not dispositive of petitioners' federal claims that the federal regulations deprive them of their Fifth

Amendment due process rights. A consolidated appeal is now pending before the Oregon Court of Appeals.

4. THE PROCEEDINGS IN THIS CASE.

In 1985, without suspension of the state court filiation and child support proceedings, the seven petitioners filed this action against the Secretary of Health and Human Services pursuant to 28 USC § 1331, 28 USC §§ 2201-2202, 5 USC §§ 701-706, and 28 USC § 1343, and against the Administrators of the Oregon Adult and Family Services Division and Support Enforcement Division pursuant to 42 USC § 1983.

Petitioners invoked exclusive federal court jurisdiction under 28 USC § 1331 to challenge the validity of the Secretary's regulations in mandating actions that affected their property and personal

rights without notice. Petitioners further invoked federal court jurisdiction under 28 USC § 1331 to determine whether or not designated fathers possess substantive Fifth Amendment due process rights that must be protected by the Secretary's regulations, or Fourteenth Amendment due process rights that states must protect at the time of the Title IV-A AFDC proceedings. These rights include a property right to be able to financially plan for the children and an "opportunity interest" to form relationships with their out-of-wedlock children, at the earliest point of government involvement with the welfare family. Petitioners alleged deprivation of these rights by the Secretary's regulations to their injury. With respect to the State of Oregon, the complaint asked that the State be enjoined from

applying the invalid federal regulations which involve them without notice.

On June 23, 1986, the District Court issued its opinion dismissing petitioners' complaint against the Secretary on the basis that the designated fathers did not challenge the validity of the federal regulations that affected their rights. (App. B at B-4). The District Court recognized, however, that the lack of notice affected the petitioners and that this system postpones the giving of notice to designated fathers without simultaneously postponing their right to be heard regarding the amount of assistance payments provided which later on became chargeable to designated fathers. (App. B at B-4).

Notwithstanding this conclusion, the District Court applied the rulings of this

Court in Blum v. Yaretsky, 457 US 991 (1982) and Rendell-Baker v. Kohn, 457 US 830 (1982) in concluding that there is no federal action where "[t]he United States does not coerce or significantly encourage an omission of notice but leaves the notice procedures to the states." (App. B at B-6). The District Court further ruled that the petitioners could raise their federal claims in state court as a partial defense to state proceedings and dismissed the petitioners' claims under the Younger abstention doctrine. (App. B at B-7).

On their appeal to the Ninth Circuit Court of Appeals, petitioners stressed that the challenged federal regulations are made reviewable by federal courts pursuant to 28 USC § 1331 and under the tests of this Court in Lugar v. Edmondson Oil

Co., Inc., 457 US 922 (1982) and Mathews v. Eldridge, 424 US 319, 335 (1976).

In its opinion of August 20, 1987, the Court of Appeals affirmed the District Court decision by applying the state action principles of Blum v. Yaretsky, supra, and Rendell-Baker v. Kohn, supra, and concluded that there was no required showing of nexus to establish federal action

> "by showing that the [federal] government exercised such coercive power or such significant encouragement that it is responsible for the specific . . . conduct challenged, or by showing that the [state defendants] ha[ve] exercised powers that are traditionally the exclusive prerogative of the [federal] government." (App. A at A-12).

The Court of Appeals also concurred with the District Court's construction of the Title IV-A statutes and Secretary's regulations, adding that the Secretary's Title IV-D CSE regulations for state

paternity and support proceedings left to the states the responsibility to give designated fathers notice in the Title IV-A proceedings. (App. A at A-13). Finally, the Court of Appeals invoked the Younger abstention doctrine as to the state defendants. (App. A at A-15).

REASONS FOR GRANTING THE WRIT

I. THE CONFLICTS ARE SUBSTANTIAL.

A conflict of major national concern exists between the constitutional rights of hundreds of thousands of designated fathers and the Secretary's regulations governing Title IV-A AFDC application for assistance proceedings which omit a notice requirement for designated fathers. The regulations deter these designated fathers from timely exercising their opportunity to parent their out-of-wedlock children, creating conflict and confusion within

the welfare family. In Lehr v. Robertson, supra, this Court defined the due process rights of biological fathers, within the context of state proceedings which gave them control over the receiving of notice, when their parental rights were terminated. Here, the Court is presented with the task of defining the due process rights of men who are designated as biological fathers, within the context of a cooperative federal-state program which involves them with the welfare program without notifying them when assistance is first provided. The concept of cooperative federalism requires that the spheres of responsibility for giving notice to designated fathers be precisely defined by the Secretary so as to avoid conflict and to maintain a balance between the national, enumerated powers and the

residual powers of the states regarding domestic relations matters.

The Court of Appeals' decision raises further conflict with the state (federal) action rule of this Court announced in Lugar v. Edmondson Oil Co., Inc. supra. The Court of Appeals failed to apply the Lugar test, which is utilized by this Court and other Courts of Appeals to find state (federal) action where statutes or regulations are directly challenged. Also, in holding that states are responsible for Title IV-A notice procedures for designated fathers (App. A at A-13), the court failed to construe the statutes and regulations in a manner consistent with rules of this Court. Bowen v. Yuckert, 482 US ___, 96 LEd2d 119 (1987). These conflicts require resolution.

II. THE ISSUES HAVE NATIONAL IMPORTANCE.

The scope of the entire AFDC program seeks involvement of all family members with the paramount goal being to help children through the family structure. 42 USC § 601; Dandridge v. Williams, 397 US 471, 479 (1970). To exclude designated fathers as parties entitled to notice at the Title IV-A proceedings is unreasonable and unconstitutional. Excluding them early on in the AFDC program makes no sense in terms of achieving national program goals. The Secretary should be compelled to carry out the implicit legislative direction to establish a national, uniform notice requirement at the AFDC Title IV-A stage, consistent with Congress' intent to promote the best interests of these children born out-of-wedlock. Earlier payment of child

support, prompted by more timely notice to the designated fathers, will tend to promote the program goal of family stability through the earlier creation of father-child bonding engendered by the earlier payment of child support by biological fathers. By recognizing the constitutional rights of designated fathers to receive notice, the conflict and confusion now experienced by hundreds of thousands of children born out-of-wedlock and designated fathers each year will be alleviated.

A. FEDERAL REGULATIONS IMPLICATE SUBSTANTIAL FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS PROPERTY RIGHTS OF DESIGNATED FATHERS AT THE TITLE IV-A AFDC APPLICATION FOR ASSISTANCE STAGE. The property rights of designated fathers are implicated at the Title IV-A stage by force of federal

regulations which target them on state forms as the individuals responsible for paying support. That specific property right which is implicated is ". . . the primary interest . . . in avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child." Rivera v. Minnich, 483 US ___, 97 LEd2d 473, 480 (1987). Without notice, designated fathers suffer a loss of their property interests at the Title IV-A stage for two reasons. First, Congress, in enacting the current CSE amendments, has extended state filiation statutes of limitation for AFDC participant states to 18 years of age. 42 USC § 666(a)(5); 45 CFR § 305.24(b). This extension gives states broad discretion as to when they may initiate Title IV-D

filiation proceedings and also removes the remedy formerly given to designated fathers to protect themselves from the prosecution of untimely filiation proceedings. The removal of this remedy by Congress mandates that the Secretary enact a notice regulation at the Title IV-A application stage to avoid placing an undue and chilling influence upon designated fathers much later on when state Title IV-D agencies request large child support arrearages. The seven petitioners, here, are being subjected to such burdensome requests for large child support arrearages because of the discretionary time allowance given to state Title IV-D agencies and the notice deficiencies in the Secretary's regulations.

Secondly, designated fathers suffer another loss of property rights at the Title IV-A stage. They lose the opportunity, at this point in time, to either rectify the needs of the children by coming forward and acknowledging paternity and raising the children, or to mitigate "the serious economic consequences" by beginning to pay some support for the children. See, Armstrong v. Manzo, 380 US 545, 550-552 (1965); City of Claremont v. Truell, 126 NH 30, 489 A2d 581 (1985).

Notice calculated to give designated fathers the opportunity to mitigate their child support obligations, then, not only means that these fathers can financially plan for their children but also means that the fathers' income and resources can, as Congress intended, be counted as resources for the children, 42 USC §§

602(a)(7)(A), leading to expeditious CSE welfare recapture. S. Rep. 98-387, 98th Cong., 2nd Sess., 2425 (1984).

B. FEDERAL REGULATIONS IMPLICATE SUBSTANTIAL FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS PERSONAL INTERESTS OF DESIGNATED FATHERS AT THE TITLE IV-A AFDC APPLICATION FOR ASSISTANCE STAGE. The "opportunity interest" of designated fathers exists where the government is engaged in the positive program of providing assistance to children and in identifying their parents. This opportunity interest finds its genesis in the AFDC program goal of strengthening the welfare family, 42 USC §§ 601, and in three of this Court's cases: Stanley v. Illinois, supra; Caban v. Mohammed, 441 US 380 (1979); and Lehr v. Robertson, supra. In Lehr, this Court, in finding that the

significance of the blood relationship is more limited, presupposed that a designated father would have an opportunity to grasp parental responsibility:

> "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Lehr v. Robertson, supra, 463 US at 262.

The Title IV-A AFDC assistance proceeding is an important government portal through which designated fathers can establish relationships with their out-of-wedlock children. A federal notice requirement, in the context of federal legislation designed to assist needy children and to promote family stability,

is absolutely necessary in order to enable designated fathers to first "grasp the opportunity" of parenthood. This opportunity interest "begins at conception and endures probably throughout the minority of the child." In Re Baby Girl Eason, ___ Ga ___, 358 SE2d 459, 462 (1987); Finnerty v. Boyett, 469 S2d 287, 292 (La. App. 2d Cir. 1985); see also, E. Buchanan, The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson, 45 Ohio St. L.J. 313 (1984).

Contrasting with Lehr v. Robertson, supra, here there exists a program of cooperative federalism within which the opportunity interest continues from the Title IV-A stage to state initiated Title IV-D filiation proceedings. The force of governmental action to establish a legal and financial relationship between father

and child presupposes that the state seeks the creation of a relationship between the father and the child, and, hence, the perpetuation of an already existing opportunity interest.

Important corollary rights to the opportunity interest are the right to associate with one's child, "an interest far more precious than any property right," Santosky v. Kramer, 455 US 745, 758-59 (1982); Stanley v. Illinois, supra, and the right to determine the family unit in which to raise one's child. Moore v. City of East Cleveland, Ohio, 431 US 494 (1977). The omission of a notice requirement by the Secretary from the Title IV-A application program substantially lessens the ability of designated fathers to exercise their opportunity interests in a timely manner to begin the task of

assuming parental obligations and to begin making decisions with the mother/applicants concerning the type of family units within which the welfare children will be raised.

C. FEDERAL REGULATIONS FAIL TO AFFORD DESIGNATED FATHERS THEIR FIFTH AND FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS TO NOTICE. Procedural due process ensures that the property rights and opportunity interests of designated fathers can be protected at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 US 254, 267 (1970). The granting of assistance to the welfare family through a federal program, involving determinations which can ultimately lead to the imposition of new parent-child bonds, demands procedural due process for the designated fathers whose

rights are implicated. Little v. Streater, 452 US 1, 13 (1981); Fuentes v. Shevin, 407 US 67, 88 (1972). In this Social Security program, designated fathers become targeted for filiation prosecution at the Title IV-A stage and the adversary nature of the relationship commences at the Title IV-A stage when the Title IV-A agency makes a determination that Title IV-D enforcement action will occur. 42 USC § 654(4)(A); 45 CFR §§ 232.49; 302.31(a)(1)(2); 303.5(a). Immediately, then, designated fathers have a "right to know" that (1) they have been named as parties responsible for providing support, on state AFDC forms, (2) that under the federal regulations, they are targeted for filiation prosecution at some time in the future, and (3) that, upon being targeted for filiation prosecution,

they have need to consult with legal counsel to become informed of their rights under state law.

The facial omission of a notice requirement for designated fathers at the Title IV-A stage makes the Secretary's regulations procedurally deficient under the tests developed by this Court in Mathews v. Eldridge, supra, 424 US at 335. Having examined the substantial private property and personal interests which are affected, a consideration of the risk of erroneous deprivation of those interests and the value of any substitute procedural safe-guards demonstrates why the Secretary, rather than the states, is responsible for providing such notice.

First, the Secretary's facial omission of notice requirements for designated fathers at the Title IV-A

application for assistance stage is procedurally inadequate because such a scheme is likely to omit many responsible fathers from participation in the Title IV-A stage with respect to ascertainment of resources available to the children. 42 USC § 602(a)(7)(A); Lehr v. Robertson, supra, 463 US at 264. It is also procedurally inadequate because it does not adopt an alternative, special administrative scheme "to protect the unmarried father's interest in assuming a responsible role in the future of his child." The qualification for receiving notice is beyond the knowledge and control of the interested, designated father. Lehr v. Robertson, supra, 463 US at 263-264.

Secondly, the Secretary's regulatory scheme of postponing notice to designated

fathers until Title IV-D filiation proceedings are filed is procedurally inadequate because it does not ensure protection of the designated fathers' ability to mitigate their child support obligations nor does it ensure promotion of timely father-child bonding. Mitchell v W.T. Grant Company, 416 US 600, 611 (1974).

Finally, the risk of erroneously depriving the rights of designated fathers because of the Secretary's facial omission of a Title IV-A notice requirement will not be cured by substitute procedural safeguards enacted by the states. None of the fifty states have enacted mandatory Title IV-A notice requirements pertaining to designated fathers. Implicit in the absence of state enactments is the notion that the states, in the absence of federal

regulations, do not consider themselves responsible for enacting Title IV-A notice requirements for designated fathers. On the other hand, the Secretary is given broad authority to enact the very regulations which can safeguard the rights of all designated fathers. 42 USC §§ 602(a)(5); 1302. But the Secretary's requirement that designated fathers be contacted at the Title IV-A stage only in narrow circumstances and not where paternity is to be established, 45 CFR §§ 232.43(g)(h), coupled with the failure of the states to enact notice provisions, makes his omission of a notice requirement not only unconstitutional but arbitrary and capricious as well. 5 USC § 706(2)(A)(B); Bowen v. Yuckert, supra, 482 US ____, 96 LEd2d at 129.

Even if states were to enact such additional or substitute procedural notice safeguards, the risk of an erroneous deprivation of the property and personal interests of designated fathers would still exist due to the interstate nature of the AFDC program. The exigencies of our modern, mobile society mean that many individuals travel from state to state while receiving public assistance. A primary example of this mobility is found in petitioner O'Dell's interstate situation. A piecemeal, state by state notice remedy would not assure that designated fathers, living in states other than where Title IV-A AFDC assistance is granted, would receive notice. In order for the notice requirement to be dependable, the notice requirement must be uniform and national.

Finally, we consider the government's interest, including fiscal and administrative burdens, that the additional or substitute procedural notice requirement would entail. The government's interest in welfare recapture is enhanced by an earlier Title IV-A notice requirement. Automated processes for locating absent parents and notice provisions for AFDC proceedings are already in place. 42 USC §§ 602(a)(4)(11); 653(a). A Title IV-A federal notice requirement would simply require states to adopt State plans applying their existing notice processes for designated fathers. Therefore, the fiscal and administrative burdens that any additional procedural notice requirement would entail are minimal compared to the continuing loss of child support collections now being experienced because of

lack of notice and consequential delays and difficulties experienced in collecting state child support claims.

III. THE FEDERAL ACTION TEST EMPLOYED BY THE COURT OF APPEALS TO DISMISS THIS CASE CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER COURTS OF APPEALS.

This Court, in the trilogy of cases, Lugar v. Edmondson Oil Co., Inc., supra; Blum v. Yaretsky, supra; and Rendell-Baker v. Kohn, supra, dealt with the establishment of state (federal) action as it applied to situations where the affected parties were litigants, beneficiaries or active participants in the activity being challenged. Here, however, the parties whose rights are implicated by government action are treated as strangers but are, nonetheless, involved in the government program without

their knowledge by virtue of federal regulations.

A basic presumption of judicial review exists for persons adversely affected by federal administrative actions which are constitutionally deficient. Abbott v. Laboratories v. Gardner, 387 US 136, 140 (1967). This Court has held in Califano v. Sanders, 430 US 99, 105 (1977) that 28 USC § 1331 confers jurisdiction on federal courts to review agency action, subject only to preclusion of review statutes. No explicit statutory provision of the AFDC program bars judicial consideration of petitioners' constitutional claims involving federal action presented here.

This Court has already determined that the proper test for federal action, where federal regulations are directly

challenged, is embodied in the case of Lugar v. Edmondson Oil Co., Inc., supra. In Lugar, this Court held that a rule of conduct imposed by the government upon an entity will convert that entity's action into action of the government. The parties must show that

> "First, the deprivation must be caused by the exercise of some right or privilege created by the [federal government] or by a rule of conduct imposed by the [federal government] or by a person for whom the [federal government] is responsible. . . . Second, the party charged with the deprivation [federal government] must be a person who may be said to be a [federal] actor. This may be because he is a [federal] official, because he has acted together with or has obtained significant aid from [federal] officials, or because his conduct is otherwise chargeable to the [federal government]." Lugar, supra, 457 US at 937. [petitioners' insertions indicated by parenthesis]

Petitioners did not seek judicial review of the misuse of a statute by any AFDC federal or state official or private

individual. Nevertheless, the Court of Appeals applied the brace of cases, Blum v. Yaretsky, supra, and Rendell-Baker v. Kohn, supra, where the state action test is applied to allegations of misuse of statutes, to this case, where direct review is sought of federal regulations which affect the rights of citizens. In so doing, the Court of Appeals, without any basis in the rulings of this Court, formulated a radical test for federal action where federal regulations are directly challenged: Is the state's failure to provide notice compelled or encouraged in any way by the Secretary? This test would allow federal regulations within a cooperative federal program, which contain due process irregularities, to go unchallenged.

Petitioners' allegations clearly meet the Lugar test for federal action. Petitioners allege that their federally guaranteed rights to due process under the Fifth Amendment have been violated by the Secretary's Title IV-A regulations themselves. The petitioners have alleged that the deprivation is caused by rules of conduct promulgated by the Secretary and mandated upon the states. The applicants are required to identify designated fathers as the financially responsible parents on Title IV-A forms and to assist the state in locating them. These rules of conduct involve the designated fathers in the Title IV-A program without their knowledge, thereby depriving them of their rights.

Secondly, the persons charged with the deprivation, namely the Secretary and

state officials, are all federal actors because they act together and the actions of Title IV-A state officials are mandated by the federal regulations. The regulations require the applicants, absent "good cause," to act jointly with state officials to identify and locate these designated fathers. There is nothing contained in the challenged federal regulations which give the states or applicants any discretion, whatsoever, to deviate from these federal rules of conduct.

The Court of Appeals' misapplication of the federal action test directly conflicts and is inconsistent with the holding of this Court in the Lugar case and is inconsistent with the holdings of Courts of Appeals in the Fourth Circuit, Beck v. Communications Workers of America

(C.W.A.), 776 F2d 1187, 1208 (4th Cir. 1985), the Sixth Circuit, Duncan v. Peck, 752 F2d 1135, 1140-1141 (6th Cir. 1985), the Seventh Circuit, Lloyd v. Lloyd, 731 F2d 393, 398-399 (7th Cir. 1984), and the Eighth Circuit, Roudybush v. Zabel, 813 F2d 173, 176-177 (8th Cir. 1987). All of these Courts of Appeals apply the Lugar state action test to direct attacks on a statute or regulations and apply the Blum and Rendell-Baker state action tests to attacks on a person's alleged misuse of a statute.

The Court of Appeals decision creates further conflict and confusion with this Court's holdings. It evades finding federal action by construing the Secretary's Title IV-D regulations, 45 CFR §§ 302.31, 302.50, 303-4 (sic) and 303-5 (sic), as giving authority to the states

to enact Title IV-A notice requirements for designated fathers. (App. A at A-13). There is absolutely no basis for this conclusion in either the language of the Social Security Act nor in the Act's Congressional history, nor have the states themselves enacted any legislation to support this interpretation. Bowen v. Yuckert, supra; Rodriguez v. Compass Shipping Co., Ltd., 451 US 596, 614 (1981).

The Court of Appeals supports its conclusion that there is no federal action by reasoning that there is no compelling need for national uniformity and that nothing in the statutory scheme indicates that Congress intended to preempt this area of traditional state concern with domestic relations (App. A at A-14). However, Congress enacted Title IV-A of

the Social Security Act as a national, interstate program to give assistance to needy children, the requirements of which the states must follow. Lukhard v. Reed, supra; King v. Smith, 392 US 309, 327-328, 333 (1968). As previously discussed, petitioner O'Dell's interstate situation graphically demonstrates the practical need for national uniformity. Moreover, a clear and manifest intention was expressed by Congress for the Secretary to issue preemptive regulations governing the entire field of Title IV-A notice and hearing procedures. 42 USC §§ 602(a)(4)(11); Hillsborough County v. Automated Med. Labs, 471 US 707, 713 (1985). Acccordingly, the Secretary has promulgated a comprehensive scheme of notice and hearing requirements for state agencies in Title IV-A proceedings. 45

CFR §§ 205.10(a)(1), 206.10(a)(4)(7), 232.43(g)(h), 232.45, 235.70. This presumption of federal preemption is strengthened because no state has enacted mandatory Title IV-A notice requirements for designated fathers and no coordinate state and federal efforts exist within either the AFDC or CSE administrative framework to provide such notice. New York State Dept. of Social Services v. Dublino, 413 US 405, 421 (1973). Clearly, a dominant need exists for a national, uniform notice requirement for designated fathers in order to resolve the substantial conflict and uncertainty over responsibility for giving the notice. Hillsborough County v. Automated Med. Labs., supra, 471 US at 713; Clearfield Trust Co. v. United States, 318 US 363, 367 (1943).

IV. THE YOUNGER ABSTENTINE DOCTRINE IS INAPPLICABLE.

The Younger abstention doctrine, announced in Younger v. Harris, 401 US 37 (1971), has never been used by this Court to prevent the disposition of substantial federal questions involving the constitutionality of federal regulations that cannot be reviewed by state courts.

All petitioners, and especially Mr. O'Dell, face continuing consequences where AFDC applicants move from state to state and receive Title IV-A assistance. Petitioners are entitled to federal relief because no opportunity exists for them to present their federal, interstate notice claims in state proceedings. Juidice v. Vail, 430 US 327, 337 (1977). The Federal Supremacy Clause, Article VI, Clause 2, provides "unambiguous authority" that

state courts simply have no jurisdiction to change federal Title IV-A regulations to give designated fathers their notice remedy on a national, interstate basis. Pennzoil Co. v Texaco, Inc., 481 US ___, 95 LEd2d 1, 18 (1987).

Because petitioners' federal claims involve interstate considerations having "substance sufficient to confer subject matter jurisdiction on the court," 28 USC § 1331, and because petitioners' state claims and federal claims "derive from a common nucleus of operative fact," bridging both state and federal Title IV-A bureaucracies, this Court may exercise pendent jurisdiction over both the petitioners' Fifth and Fourteenth Amendment claims. United Mine Workers of America v. Gibbs, 383 US 715, 725 (1966).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Philip F. Schuster, II
Counsel of Record
Roger F. Dierking
Counsel for Petitioners

November 12, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONNIE O. KITCHENS, et al., Plaintiffs-Appellants,	)	No. 86-3994
v.	)	D.C. No.
	)	CV-85-1815-RE
OTIS R. BOWEN, et al. Defendants-Appellees.	)	OPINION

Argued and Submitted
July 8, 1987 - Portland, Oregon

Filed August 20, 1987

Before: John F. Kilkenny, Alfred T. Goodwin and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Kilkenny

Appeal from the United States District Court for the District of Oregon
James A. Redden, District Judge, Presiding

COUNSEL

Philip F. Schuster, II, Roger F. Dierking, Portland, Oregon for the plaintiffs-appellants.

Robert M. Atkinson, Salem, Oregon, Felicia Chambers, Washington D.C., for the defendants-appellees.

OPINION

KILKENNY, Senior Circuit Judge:

This appeal arises out of a challenge to the constitutionality of a social welfare program that does not mandate immediate notice to the putative fathers of children whose mothers apply for benefits under that program. The questions presented for review are whether the district court erred by dismissing the complaint as against the federal defendant for lack of any federal action, and against the state defendants by virtue of the doctrine of abstention. For the reasons set forth below, we affirm.

FACTS AND PROCEEDINGS BELOW

Appellants are a group of seven men who, in applications submitted for benefits under the Aid to Families with Dependent

Children ("AFDC") program,[1] were identified by the mothers of children born out of wedlock as the children's fathers. At the time of their filing the underlying action, appellants were all defendants in Oregon state court proceedings brought by the state to establish paternity and, pursuant to the AFDC applicants' assignment of support rights to the state, to collect support obligations. In suing the Secretary of the United States Department of Health and Human Services ("Secretary" or "federal defendant"), the Administrator of the Adult and Family Services Division of the Oregon Department of Human Resources, and the Administrator of the Support Enforcement Division of the Oregon Department of Justice ("state defendants"),

---

[1] Pub. L. No. 271, §§ 401 et seq., codified as Title IV-A of the Social Security Act at 42 U.S.C. §§ 601 et seq.

appellants have alleged that the federal regulations governing the administration of the AFDC program are unconstitutional because they do not provide for notice to putative fathers at the time when mothers of children born out of wedlock apply for AFDC assistance.

The district court dismissed appellants' claim against the federal defendant, both because the complaint failed to allege federal action on the part of that defendant sufficient to warrant the exercise of federal subject matter jurisdiction over the claim, and because the complaint failed to state a claim upon which relief could be granted. The claim against the state defendant was also dismissed under the provisions of the so-

called Younger abstention doctrine.[2] It is from the dismissal of their complaint that appellants have timely appealed.

STANDARD OF REVIEW

We review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction. Abrams v. Commissioner, 814 F.2d 1356, 1357 (CA9 1987). Similarly, we review de novo a district court's decision to dismiss a complaint for failure to state a claim upon which relief can be granted. Newman v. Universal Pictures, 813 F.2d 1519, 1521 (CA9 1987). Finally, we review de novo a dismissal based on the doctrine of abstention. Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353, 1356 (CA9 1986).

---

[2] Younger v. Harris, 401 U.S. 37, 44-45 (1971).

DISCUSSION

1. Background

At the heart of this appeal lies the scheme of cooperative federalism existing between the state and federal governments under the AFDC program. The avowed purpose of this program is to promote the benefits of family life by encouraging the care of, inter alia, fatherless,[3] needy children, either in their own homes or in those of relatives, by providing financial assistance to the children's mothers or other relatives. 42 U.S.C. §§ 601.

In a nutshell, the AFDC program works as follows. Financial assistance to needy children is provided by state agencies, which are in turn eligible for federal

---

[3] The AFDC program "offers welfare payments to families in which the father is dead, absent, disabled or, at the State's option, unemployed." S. Rep. No. 93-1356, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 8133, 8146.

matching funds if their assistance plans comply with both the Social Security Act's relevant statutory requirements and the regulations implementing the program. For example, a state's plan must provide for prompt notice to the state's child support collection agency upon the furnishing of AFDC assistance to a child who has been deserted or abandoned by a parent, including a child born out of wedlock, without regard to whether the paternity of that child has been established. 42 U.S.C. §§ 602(a)(11). In addition, and as a condition of eligibility, the AFDC applicant must assign to the state any rights to support she may have from any other person and which have accrued at the time the assignment is executed. 42 U.S.C. §§ 602(a)(26)(A). Also, the applicant is generally required to cooperate with the

state, both in establishing the paternity of a child born out of wedlock and in obtaining support therefor. 42 U.S.C. §§ 602(a)(26)(B).

The state must have in effect a plan to establish paternity, locate absent parents, and obtain child and spousal support. 42 U.S.C. §§ 602(a)(27). Similarly, the state must provide child support enforcement services with respect to all AFDC recipients. 42 U.S.C. §§ 654(4). Finally, support rights assigned to the state under the AFDC program constitute obligations owed to the state and are collectable by the state under relevant state and local processes. 42 U.S.C. §§ 656(a)(1).

2. Federal Jurisdiction

The gravamen of appellants' complaint against the Secretary is that, in

promulgating the regulations governing the administration of the AFDC program, the Secretary failed to require that, at the time mothers of children born out of wedlock apply for AFDC benefits, putative fathers be given notice of the filings of such applications and an opportunity for a hearing. As a result, appellants argue, they have no opportunity to contest the level of AFDC assistance provided and, by virtue of the mothers' assignment of support rights to the state, appellants now face substantial support obligations to the state which accrued during the prenotice period.

The Secretary contends that dismissal was proper because appellants failed to allege and show any federal action. The AFDC statute and regulations leave the responsibility for formulating specific

procedures for determining paternity and support obligations to the individual states; therefore, the Secretary asserts, if appellants were deprived of any constitutional rights, the responsibility for that deprivation must fall on the shoulders of the state defendants.

In addressing this issue, we note at the outset that "[t]he standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the strictures of the Fourteenth Amendment." Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 487 (CA9 1974); see also Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1435 (CA 1986) (applying principles of state action cases to federal action issue), cert denied, ___ U.S. ___, 107

S.Ct. 949 (1987). Accordingly, this court turns now to an examination of the leading state action cases.

[1] The relevant standards are set forth in the brace of cases, Blum v. Yaretsky, 457 U.S. 991 (1982) and Rendell-Baker v. Kohn, 457 U.S. 830 (1982). Those decisions make clear that, even though the state defendants here were subject to federal regulations in administering the AFDC program, that fact alone does not establish federal action. Blum, 457 U.S. at 1004; Rendell-Baker, 457 U.S. at 841. Appellants must show that

> "'there is a sufficiently close nexus between the [federal government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [federal government] itself.' [Citation omitted] The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the [federal government] is

> responsible for the specific conduct of which the plaintiff complains."

Blum, 457 U.S. at 1004 (quoting (sic) Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (emphasis in original); accord, Fidelity Fin., 792 F.2d at 1435. Appellants may establish this required nexus only

> "by showing that the [federal] government exercised such coercive power or such significant encouragement that it is responsible for the specific . . . conduct challenged, or by showing that the [state defendants] ha[ve] exercised powers that are traditionally the exclusive prerogative of the [federal] government."

Id. (citing Blum, 457 U.S. at 1004-1005).

[2] As already indicated, the specific conduct challenged by appellants here is the failure to provide for notice and an opportunity for a hearing at the so-called Title IV-A, or AFDC application, stage. While the federal regulations make no

provision for such notice and hearing, they do not prohibit the states from granting such rights, either. Indeed, the entire AFDC scheme is designed to leave the states responsible for the specific procedures to be employed, subject only to the broad parameters outlined in the federal statutes and regulations. See, e.g., 45 C.F.R. §§ 302.31, 302.50, 303-4, and 303-5 (requiring states to establish paternity and secure support obligations in accordance with state law).

The State of Oregon was and is free to adopt procedures to give timely notice to putative fathers, and there is no evidence that its failure to do so was compelled or encouraged in any way by the Secretary. Nor is it significant that the Secretary did not take action in the face of the state's failure to provide for such notice:

"Mere approval of or acquiescence in the initiatives of [the state defendants] is not sufficient to justify holding the [Secretary] responsible for those initiatives . . . . " Blum, 457 U.S. at 1004-1005.

[3] Finally, the realm of domestic relations is and has been traditionally governed by state law. Lehr v. Robertson, 463 U.S. 248, 256 (1983). Accordingly, appellants' argument that there is a compelling need for national uniformity in this area that overrides any state interests fails; there is nothing in the statutory scheme to indicate a "clear and manifest" intent on the part of Congress to preempt the entire field. Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 716 (1985). The claim against the federal defendant was properly dismissed.

3. Younger Abstention

At the time appellants brought this action, they were all defendants in Oregon state court proceedings brought by the state to establish paternity and collect support obligations on behalf of children who were receiving or had received AFDC benefits. In the underlying action, appellants sought a declaratory judgment that the federal AFDC regulations were unconstitutional and an order restraining the state defendants from, inter alia, collecting all past and future support obligations. As indicated above, the district court dismissed appellants' claim against the state defendants based on the principles espoused in Younger v. Harris, 401 U.S. 37 (1971).

While the Younger case involved criminal proceedings, "[C]oncerns of comity

and federalism counsel restraint in civil proceedings as well, when important state interests are at stake." Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d at 1356; accord, Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982) ("[t]he policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved." Thus,

> "[A]bstention is appropriate in favor of a state proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions."

Fresh Int'l, 805 F.2d at 1357-58 (citing Middlesex, supra).

Appellants argue that the first prong of the above three-part test has not been

met because four of the appellants' state court proceedings are no longer "ongoing". This argument fails for two reasons.

[4] First, Oregon law subjects these appellants to ongoing child support proceedings that continue until the applicable support orders are either vacated or dismissed. Or. Rev. Stats. §§ 107.135, 109.103. Until then, either party to those proceedings can file a motion requesting that the state court modify the support order. Id.

[5] Second, Fresh Int'l suggests that the critical question is not whether the state proceedings are still "ongoing", but whether the "state proceedings were underway before initiation of the federal proceedings." 805 F.2d at 1358. There is no dispute that all of the appellants were already defendants in the state court

proceedings prior to the commencement of the federal action.

Appellants next contend that the state interests involved are not sufficiently important to justify Younger abstention. In support of this position they first argue, citing Miofsky v. Superior Court, 703 F.2d 332 (CA9 1983), that this court is reluctant to extend the Younger doctrine to civil litigation, particularly in civil rights suits.

It is true that, prior to Fresh Int'l, this court was somewhat hesitant to expand Younger beyond criminal or quasi-criminal contexts. See, e.g., Playtime Theaters v. City of Renton, 748 F 533 (CA9 1984) rev'd on other grounds, 475 U.S. 41 (1986); Goldie's Bookstore v. Superior Court, 739 F.2d 466, 469-70 (CA9 1984). However, Fresh Int'l recognizes that the earlier

view was too restrictive and that abstention is warranted whenever an important state interest is implicated. 805 F.2d at 1359-60. Moreover, the Supreme Court held in Trainer v. Hernandez, 431 U.S. 434 (1977) that a state's interests in "administering its public-assistance programs" and "safeguarding the fiscal integrity of those programs" were sufficiently important to warrant application of the Younger abstention doctrine. Id. at 444.

Appellants' further argument that the interests of the State of Oregon are outweighed by the need for national uniformity in AFDC procedures is no more persuasive in this context than it was with respect to their claim against the federal defendant, above. Similarly, appellants' argument that the claim against the state

defendants should have been retained under the pendent jurisdiction doctrine of United Mine Workers v. Gibbs, 383 U.S. 715 (1966) ignores the underlying rationale of that decision: Appellants' claim against the federal defendant was properly dismissed, and Gibbs states that "if the federal claims are dismissed before the trial . . . the state claims should be dismissed as well." Id. at 726.

[6] Finally, there is no merit to appellants' argument that they do not (or did not) have an adequate opportunity to raise their federal constitutional claims in the state court proceedings. Three of the appellants did in fact present their constitutional claims in the state court and prevailed thereon. The state trial court determined that the state's failure to notify these appellants at the AFDC

application stage denied them their rights to due process and equal protection under the constitutions of both the United States and Oregon.[4]

As to those appellants whose paternity proceedings have terminated, or those who failed to raise their constitutional claims in state court, the relevant question is whether they "could have presented" those claims to the state court. Fresh Int'l, 805 F.2d at 1362 (emphasis in original). "All that Middlesex requires is an opportunity to present the federal issue. . . ." Id. (emphasis in original); see also Juidice v. Vail, 430 U.S. 327, 337 (1977)(same). The success of the three appellants mentioned above belies any argument that the remaining appellants did not themselves have the opportunity to

---

[4] Those decisions are now before the Oregon Court of Appeals.

raise the constitutional issues in state court. The district court therefore did not err in dismissing appellants' claim against the state defendants.

CONCLUSION

For the reasons set forth above, the decision of the district court is hereby AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONNIE O. KITCHENS, et al., Plaintiffs-Appellants,	)	No. 86-3994
v.	)	D.C. No. CV-85-1815-RE
OTIS R. BOWEN, et al. Defendants-Appellees.	)	

APPEAL from the United States District Court for the District of Oregon (Portland).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon (Portland) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 20, 1987

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RONNIE O. KITCHENS, MICHAEL J. CALLAGHAN, GORDON D. O'DELL, JOHN F. MOORE, GLENN D. ROGIE, GERALD E. RYON and ROBERT W. DICKINSON, Plaintiffs,	)	
v.	)	Civil No. 85-1815-JU
OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES OF AMERICA; KEITH PUTMAN, ADMINISTRATOR, ADULT AND FAMILY SERVICES DIVISION, DEPARTMENT OF HUMAN RESOURCES, STATE OF OREGON; JIM HUNTER, ADMINISTRATOR, SUPPORT ENFORCEMENT DIVISION, DEPARTMENT OF JUSTICE, STATE OF OREGON, Defendants.	)	OPINION

Philip F. Schuster, II
Roger F. Dierking
Attorneys at Law
1500 N.E. Irving, Suite 540
Portland, Oregon 97232

Attorneys for Plaintiffs

Richard K. Willard
Assistant Attorney General
Sheila Lieber
Felicia L. Chambers
Civil Division
U.S. Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Charles H. Turner
United States Attorney
Jack G. Collins
Assistant U.S. Attorney
312 U.S. Courthouse
620 S.W. Main
Portland, Oregon 97205

Attorneys for Federal Defendant

Dave Frohnmayer
Attorney General
Glenn Klein
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310

Attorneys for Defendants
Keith Putman and Jim Hunter

REDDEN, Judge:

Plaintiffs bring this action, claiming their right under the due process clause of the United States Constitution, to receive notice from the government that they are named as fathers at the time when

application is made for Aid for Dependent Children (AFDC) support by the mothers. Both federal and state defendants move for dismissal pursuant to Fed. R. Civ. P. 12(c). Magistrate Juba recommended granting both motions in his Findings and Recommendation of April 24, 1986. I adopt the Recommendation.

BACKGROUND

I will comment, but briefly, as the Magistrate's opinion is detailed and correct.

The factual background is undisputed. Plaintiffs are all purported fathers of children and are or have recently been involved in state court actions concerning their paternity and support obligations. Although they received notice of the paternity and support proceedings, they did

not receive notice when the mothers applied for AFDC.

The failure to receive notice affects plaintiffs. Federal regulations, which plaintiffs do not challenge, mandate that AFDC states: (1) require applicant mothers to assign their support rights to the state; (2) require the applicant mothers' promise to cooperate in establishing paternity, absent good cause; and (3) impose an obligation upon the fathers for support. Under such regulations, an individual later found to be the father has incurred obligations for AFDC payments from their commencement, although he did not have notice or opportunity to be heard on setting the amount of those payments. Plaintiffs say this failure to give notice violates their due process rights.

DISCUSSION

When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). Here plaintiffs object to the entirety of the Findings and Recommendation, and thus I review it in its entirety de novo.

A. Federal Defendant

Federal defendant argues that he is free from liability as a matter of law, because there has been no federal action. The federal action principle is merely the analog of the state action principle as applied to the federal government. Geneva

Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974). The state action principle is expressed in Blum v. Yaretsky, 457 U.S. 991, 1005-006 (1982), and is detailed in the briefs and the Magistrate's well reasoned opinion.

Plaintiffs fail to point to a federal statute or regulation that requires the states not to give notice at the AFDC application stage. The United States does not coerce or significantly encourage an ommission of notice but leaves the notice procedures to the states. 42 U.S.C. §§ 656(a)(1); 42 U.S.C. §§ 602(1)(27). The federal government has not preempted the entire field, making it impossible for a state to impose its own notice requirements. The statutes are clear that the

states are free to impose their own regulations.

Since there has been no federal action, this claim for violation of due process must be dismissed. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 925 (1982).

B. State Defendants

The state defendants argue that the Younger abstention doctrine requires dismissal as against them. This doctrine does require a federal court to abstain from any action against state officials in which:

> (1) the plaintiffs sought to enjoin the continuation of the state proceeding or sought to enjoin state officials from enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement proceeding.

L.H. v. Jamieson, 643 F.2d 1351, 1352-53 (9th Cir. 1981).

Plaintiffs do seek to enjoin a state statute. The remedy they seek is to preclude collection of accrued child support for the prenotice period. This basis for federal relief could have been raised as a partial defense to the state proceedings to which these plaintiffs are or were involved.

This case is not clearly distinguishable from Trainer v. Hernandez, 431 U.S.434 (1977), wherein the Supreme Court held that the federal court should abstain from intervening in a pending state civil enforcement proceedings.

Plaintiffs argue that the actions of some plaintiffs have been terminated. However, the question is not whether they presented their federal claims in the state proceedings, but whether they had the

opportunity to do so. Juidice v. Vail, 430 U.S. 327, 337-38 (1977).

CONCLUSION

Upon de novo review, I find that Judge Juba's Findings and Recommendation properly dismissed all claims. There is an absence of federal action by the federal defendant, and a federal claim may not be pursued against the state defendants.

DATED this 23 day of June, 1986.

James A. Redden
James A. Redden
United States District Judge

FILED June 24, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RONNIE O. KITCHENS, MICHAEL J. CALLAGHAN, GORDON D. O'DELL, JOHN F. MOORE, GLENN D. ROGIE, GERALD E. RYON and ROBERT W. DICKINSON, Plaintiffs,	)	
v.	)	Civil No. 85-1815-JU
OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES OF AMERICA; KEITH PUTMAN, ADMINISTRATOR, ADULT AND FAMILY SERVICES DIVISION, DEPARTMENT OF HUMAN RESOURCES, STATE OF OREGON; JIM HUNTER, ADMINISTRATOR, SUPPORT ENFORCEMENT DIVISION, DEPARTMENT OF JUSTICE, STATE OF OREGON, Defendants.	)	ORDER

IT IS ORDERED that the Findings and Recommendation of Judge Juba dated April 24, 1986 are ADOPTED.

Dated this 23 day of June, 1986.

James A. Redden

James A. Redden
United States District Judge

FILED June 24, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RONNIE O. KITCHENS, et al.,	)	
Plaintiffs,	)	
v.	)	Civil No. 85-1815-JU
OTIS R. BOWEN, Secretary Department of Health and Human Services, et al.,	)	JUDGMENT
Defendants.	)	

Based on the record,

IT IS ORDERED that this action is dismissed.

Dated this 25 day of June, 1986.

Jeffrey Amram
Clerk, United States District Court

FILED June 25, 1986

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RONNIE O. KITCHENS, et al., Plaintiffs,	)	
v.	)	Civil No. 85-1815-JU
OTIS R. BOWEN, Secretary of Health and Human Services, et al., Defendants.	)	FINDINGS AND RECOMMENDATION

PHILIP F. SCHUSTER, II
ROGER F. DIERKING
1500 N.E. Irving, Suite 540
Portland, Oregon 97232

Of Attorneys for Plaintiff

RICHARD K. WILLARD,
Asst. Attorney General
U.S. Dept. of Justice-Civil Div.
CHARLES H. TURNER,
United States Attorney
JACK G. COLLINS,
Asst. U.S. Attorney
312 U.S. Courthouse
620 S.W. Main Street
Portland, Oregon 97205
FELICIA CHAMBERS
U.S. Dept. of Justice, Rm. 3537
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Attorneys for Federal Defendant

JUBA, Magistrate:

PRELIMINARY STATEMENT

Plaintiffs are six individuals, each of whom is or was a defendant in an Oregon state court proceeding brought by the State to establish paternity and child support obligations.

They bring this action against the Secretary of the U.S. Department of Health and Human Services, (federal defendant or Secretary), the Administrator of Adult and Family Services of the Oregon Department of Human Services, and the Administrator of the Support Enforcement Division of the Oregon Department of Justice (State defendants) alleging that regulations governing the establishment of paternity and obligations owed to recipients of Aid to Families with Dependent Children (AFDC)

are unconstitutional. Plaintiffs seek relief pursuant to 42 U.S.C. § 1983.

Plaintiffs claim that the Secretary's implementation of the AFDC and Child Support Enforcement (CES) programs, which direct participating states, in accordance with state law, to establish the paternity of and support obligations owed to AFDC recipients, violates due process. As to the Federal Defendant, plaintiffs allege that due process requires that the Secretary mandate that State provide putative fathers with notice and a hearing at the time AFDC applications are filed, and that the Secretary must prescribe when and under what circumstances blood testing can be utilized in paternity actions. Further, plaintiffs allege that the federal regulations unlawfully omit requirements allowing putative fathers to show that

granting AFDC benefits to children while in their mother's care is against the best interests of the child. Plaintiffs also attack the Oregon statutory and regulatory schemes as violative of due process and equal protection of the law.

As relief plaintiffs seek a declaratory judgment determining the invalidity of the federal regulations, and an injunction directing the Federal and State Defendants to promulgate specific regulations incorporating additional protections and prohibiting the State from collecting any support obligations until these regulations are promulgated.

The Federal Defendant now moves to dismiss this action for lack of subject matter jurisdiction and because plaintiffs have failed to state a claim upon which relief may be granted. The State

Defendants move to dismiss pursuant to Fed. R. Civ. P. 12 on the basis of the Younger abstention doctrine. Both motions to dismiss should be granted.

STATUTORY BACKGROUND

This summary of the relevant statutes is taken from the Secretary's well-written brief.

The AFDC program was enacted by Congress in 1935, Act of August 14, 1935, Pub. L. No. 271, § 401 et seq., 49 Stat. 627, et seq., and is established in Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq. The purpose of the AFDC program is to encourage the care of needy dependent children in their own homes or those of relatives in order to help maintain and strengthen family life, and to assist the parent or relatives with whom they are living to attain or retain

the maximum self-sufficiency that is consistent with continuing parental care and protection. 42 U.S.C. § 601 "... (AFDC) offers welfare payments to families in which the father is dead, absent, disabled or at the state's option, unemployed." S. Rep. No. 93-1356, 93rd Cong., 2nd Sess., reprinted in, 1974 U.S. Code Cong. & Ad. News 8133, 8146. The AFDC program is based on a scheme of cooperative federalism in which Congress provides certain sums to be paid to the states which have approved state plans providing for state financial participation in furnishing aid and services to needy children. 42 U.S.C. §§ 601, 602(a)(2).

Congress required that the state plan shall provide that such aid be furnished with reasonable promptness to all eligible

individuals. 42 U.S.C. § 602(a)(10)(A). The state plan must also provide that prompt notice be given to the state child support collection agency of the furnishing of AFDC to a child who has been deserted or abandoned by a parent, including a child born out of wedlock, without regard to whether the paternity of that child has been established. 42 U.S.C. § 602(a)(11). As a condition of eligibility, the AFDC applicant must assign to the state any rights to support he or she may have from any other person and which have accrued at the time the assignment is executed. 42 U.S.C. § 602(a)(26)(A). Also, the applicant must cooperate with the state in establishing the paternity of a child born out of wedlock who receives AFDC, and in obtaining support, unless the applicant

has good cause for refusing to cooperate as determined by the state agency in accordance with standards prescribed by the Secretary. 42 U.S.C. § 602(a)(26)(B). The state must also have in effect a plan to establish paternity, locate absent parents, and obtain child and spousal support under Subchapter IV-D of the Act. 42 U.S.C. § 602(a)(27). The Secretary must approve a state plan that complies with the provisions of section 602(a). 42 U.S.C. § 602(b).

In 1975, Congress enacted the CSE program, Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a) et seq., as Title IV-D of the Social Security Act. 42 U.S.C. § 651 et seq. In so doing, Congress authorized federal financial support for a panoply of services and programs designed to

encourage the enforcement of child support obligations by the states. See, 1974 U.S. Code Cong. & Admin. News, at 8160. Congress was concerned with the steadily rising costs of the AFDC program and sought to redress a national failure to enforce support obligations owed dependent children, a principal cause of the rising AFDC costs. Id. at 8145-8149. To accomplish this, the legislation mandated that the states provide child support enforcement services with regard to all AFDC recipients. 42 U.S.C. § 654(4). The state plan must comply with standards that the Secretary has determined are necessary to the establishment of an effective program. 42 U.S.C. § 652(13)(a)(1). Support rights assigned to the state under the AFDC program constitute an obligation owed to the state and are collectible by

the state under applicable state and local processes. 42 U.S.C. § 656(a)(1).

In the 1984 amendments, Congress mandated that effective October 1, 1985, the states shall have an effect all laws to improve child support enforcement, 42 U.S.C. § 654(20), including expedited processes under the state judicial or administrative systems for obtaining and enforcing support orders, and, at the state's option, for establishing paternity. 42 U.S.C. § 666(a)(2). Congress also provided that the state plan shall permit the establishment of the paternity of any child prior to his or her eighteenth birthday. 42 U.S.C. § 666(a)(5). The Secretary has promulgated regulations implementing the AFDC and CSE programs at 45 C.F.R. § 232.1 et seq., and 45 C.F.R. § 300 et seq.

II. DISCUSSION

A. The Federal Defendant

Plaintiffs contend that the failure of the federal regulations to provide notice and an opportunity for plaintiffs, as persons designated as fathers by mothers receiving AFDC benefits, to participate in the application for assistance procedure is inconsistent with the Congressional mandate and in violation of plaintiffs' due process and equal protection rights. Plaintiffs allege that the federal regulations deny them the opportunity to participate during the application procedure, in the determination of what is in the child's best interest.

1. Legal Standards

The standards utilized to find federal action for purposes of the Fifth

Amendment are the same as those employed to detect state action. Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1984); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1981). The ultimate issue in determining whether a party is subject to suit under § 1983 is whether the alleged infringement of federal rights is fairly attributable to that party. Id.

The Supreme Court has recently discussed the elements required to establish governmental action. Regulation of an entity does not convert that entity's action into governmental action. Plaintiffs must show that:

> "There is a sufficiently close nexus between the [federal government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [federal government] itself." [citation omitted]. The purpose of this requirement is to assure that

> constitutional standards are involved only when it can be said that [the federal government] is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident, when, as in this case, the complaining party seeks to hold the [federal government] liable for the actions of private parties.

Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original). The government is responsible for the actions of third parties when it has exercised coercive power or provided such significant encouragement that the law imputes the action to the government itself. Id. Mere approval of, or acquiescence in, the decisions of a third party is not sufficient to justify holding the government responsible for those actions. Id. Finally, the required nexus may be present if the federal government has exercised powers that are

'traditionally the exclusive perogative of the state'. Blum, at [illegible]005.

2. Analysis of the Regulations

Essentially the Secretary argues that the challenged regulations are the actions of the State of Oregon and not mandated by the federal regulations. Plaintiffs basically argue that the federal regulations pre-empt the State and are inadequate for failure to mandate notice and hearing requirements.

In accordance with the Congressional prescription that AFDC be provided to eligible persons with reasonable promptness, 42 U.S.C. § 602(a)(10)(A), the Secretary determined, that each person wishing to apply for AFDC would have the opportunity to do so without delay, 45 C.F.R. § 206.10(a)(1). The AFDC applicant or recipient must assign any rights to

support to the state, and cooperate in establishing the paternity of children born out of wedlock, and support obligations, 45 C.F.R. §§ 232.11(a)(1)(i), (ii), 232.12(a)(i), (2), (3), unless good cause for refusing to cooperate is found.

Good cause, as defined by the Secretary, encompasses circumstances which are against the best interests of the child, and includes situations where cooperation may result in physical or emotional harm to the child or caretaker relative, where the child was conceived as a result of rape or incest, or where adoption proceedings are being contemplated or are pending. 45 C.F.R. § 232.42(a).

The CSE regulations mandate that a state undertake to establish the paternity of a child born out of wedlock who is

receiving AFDC benefits, and to secure support for that child "from any person who is legally liable, using state laws. . ." 45 C.F.R. § 302.31(a)(1), (2), 303.4(a), 303.5(a)(1), (2), (emphasis added). The support obligation, constituting an obligation owed to the State, shall be established by "[o]rder of a court of competent jurisdiction, [or] [o]ther legal process as established by State laws. . ." 45 C.F.R. §§ 302.50(a), (1), (2), 303.4(b) (emphasis added).

Pursuant to the Child Support Enforcement of 1984, the Secretary promulgated regulations which require (effective October 1, 1985,) that states enact laws providing for expedited processes having the same force and effect as those established through judicial process to establish and enforce child

support obligations. 45 C.F.R. § 302.70(a)(2). These regulations mandate that support enforcement proceedings be completed in one year from filing, and that the state may utilize such proceedings in the establishment of paternity. 45 C.F.R. §§ 303.101(b)(2), (3). "Orders established [under expedited processes] must have the same force and effect under state law as orders established by full judicial process within the state[;] [t]he due process rights of the parties involved must be protected; [and] [t]he parties must be provided a copy of the order..." 45 C.F.R. § 303.101(c)(1), (2), and (3).

In enacting the Child Support Enforcement Amendments of 1984 Congress stated that "basic responsibility for child support and establishment of

paternity is left to the states," S. Rep. No. 98-378, 98th Cong., 2nd Sess, reprinted in, 1983 U.S. Code Cong. & Admin. News, 2397, 2402-2403.

Congress specifically noted that:

> [the] provision does not mandate a particular procedure nor authorize the Federal agency to impose its views as to the details of State court organization. What is required is that States adopt structures and procedures which will assure that child support and paternity actions are processed in an expeditious manner.

1983 U.S. Code Cong. & Admin. News at 2425. "It is not intended that the Secretary be authorized to specify the particular administrative or judicial structures to be adopted by the States. Rather, it is intended that the Secretary should measure a State's compliance with this provision primarily on the basis of the results it produces." Id. at 2454.

The Secretary is not responsible for the State of Oregon's failure to provide notice and an opportunity to be heard to the putative fathers. Likewise, the Secretary is not responsible for the State's policy regarding use of blood testing in paternity actions. The required nexus between the federal regulations and plaintiffs' injury is missing. The challenged decisions made by the State according to standards that are not established by federal government. See Blum, 457 U.S. at 1008.

Moreover, this is not a situation in which the federal government has exercised powers 'traditionally within the exclusive perogative' of the State. The regulation of marital and family relationships is traditionally reserved to the states. Sherrer v. Sherrer, 334 U.S. 343, 354

(1948); Lehr v. Robertson, 463 U.S. 248, 256 (1983). The regulations in question preserve the states' traditional role.

Plaintiff contends that the State is pre-empted from providing for notice by the federal regulations. The Supreme Court has recently discussed pre-emption:

> the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to federal law. Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emption language, Congress' intent to pre-empt all state law in a particular area may be inferred when the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."
>
> Even where Congress has not completely displaced state regulation in a specific area, state law is

> nullified to the extent that it actually conflicts with the federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the full accomplishment and execution of the full purposes and objectives of Congress. . .

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., ___ U.S. ___, 105 S. Ct. 2371, 2375 (1985). Where the field is one in which the states have traditionally regulated, there is a presumption that federal regulation has not pre-empted state law unless that purpose is clear and manifest. Hillsborough County, 105 S. Ct. at 2376 (quoting Jones v. Rath Packing Co., 430 U.S. 520, 525 (1977)). "Courts are not to seek out conflicts between state and federal regulation where none clearly exists;" U.S. v. State of California, 694 F.2d 1171, 1176 (9th Cir. 1982).

The field of domestic relations and family relationships is traditionally regulated by state law. Lehr, 463 U.S. at 256. Therefore, in order to overcome the presumption of non-pre-emption plaintiffs must show that the federal regulations manifest a clear purpose to pre-empt. There is no indication that Congress intended to pre-empt state law. On the contrary, the regulations indicate Congressional deference to state law in the establishment of the regulations at issue here. Moreover, there is no evidence that there would be a conflict between the federal and state regulations if the state were to provide the notice and hearing procedures and blood test regulations requested by plaintiffs.

3. Conclusion

There is no federal action in the

failure of the State of Oregon to provide putative fathers with notice and an opportunity to be heard in paternity and child support proceedings. There is no federal action in the state's regulation and use of blood testing. Plaintiffs have failed to establish that the federal defendant has violated rights secured by the Fifth Amendment. The Secretary's motion to dismiss should be granted.

B. The State Defendants

1. Background

Plaintiffs are six persons who have been sued in state court by the State of Oregon. In each of the state court actions the State is seeking to establish that each plaintiff here is the father of a child who is or has been receiving AFDC benefits. In addition, the State seeks a state court order granting back and future

child support. In this federal court action plaintiffs seek to enjoin the state from proceeding with the state court actions against them.

Plaintiffs allege that the state statutes governing the establishment of paternity and eligibility for AFDC assistance unconstitutionally omit notice and hearing requirements. The State moves to dismiss this action pursuant to the Younger abstention doctrine.

2. Younger Abstention

In Younger v. Harris, 401 U.S. 37 (1971), the U.S. Supreme Court held that absent extraordinary circumstances, a federal court cannot enjoin a pending state court criminal proceeding. In a second case decided at the same time as Younger, the Supreme Court held that the Younger doctrine would also prohibit the

issuance of a declaratory judgment. Samuels v. Mackell, 401 U.S. 66 (1971). Where there is a pending state court criminal proceeding, absent "great and immediate irreparable injury to the federal plaintiff" and unless "state law clearly bars the interposition of the constitutional claims," the federal court must abstain from deciding the constitutional questions, and must dismiss the federal suit. Moore v. Simms, 442 U.S. 415, 423, 426 (1979).

> "Younger, and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying Younger abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their

separate functions in their separate ways." Id. at 44. Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights.

The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. Moore v. Sims, 442 U.S. 415, 423 (1979); Huffman v. Pursue, Ltd., 420 U.S. 592, 604-605 (1975). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in Huffman, supra. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977). Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." Moore, 442 U.S., at 426. "[T]he ... pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims..." Id., at 430. See also Gibson v. Berryhill, 411 U.S. 564 (1973).

Middlesex County Ethics Committee v. Garden, 457 U.S. 423, 431-32 (1982).

In Trainor, the Supreme Court held that the state's roles in "administering its public assistance programs" and "safeguarding the fiscal integrity of those programs" are important state interests which prohibit a federal court from interfering with a pending state court action. At the time the federal plaintiff had filed suit in federal court, there was a pending state action involving a suit by the state to recover welfare payments which the federal plaintiff had fraudulently obtained. The Supreme Court held that the federal district court should have abstained because of the important state interests (administering public assistance programs, and the fiscal integrity of those programs) which were involved in the state court proceedings.

In the Middlesex County case the Court held that a federal court should not interfere with state bar disciplinary proceedings in state court:

> "Because respondent Hinds had an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved,' Gibson v. Berryhill, 411 U.S., at 577, and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings." Id. at 437.

The Middlesex County Court established the following test for abstention: (1) whether the ongoing proceedings at the state level constitute judicial proceedings; (2) whether those state proceedings implicate important state interest; and (3) whether there is an adequate opportunity to raise constitutional challenges in the state proceedings. Middlesex, 457 U.S. at 432.

The Ninth Circuit has commented that:

> "Younger and its progenies share two principal characteristics: (1) the plaintiffs sought to enjoin the continuation of the state proceedings or sought to enjoin state officials from enforcing a state statute, and (2) the basis for federal relief could have been raised as a complete or partial defense to a pending or ongoing state enforcement action during the normal course of the state proceedings... When these characteristics are not present, however, the Supreme Court has refused to find the Younger concerns sufficiently compelling to warrant federal equitable restraint, even where a plaintiff could have raised the claim in a pending state proceeding." (citations omitted)

L.H. v. Jamiseon, 643 F.2d 1351 (9th Cir. 1981).

2. Analysis of the Evidence

The state paternity and support enforcement proceedings are judicial proceedings. As in Trainor, they involve important state interests in 'safeguarding the fiscal integrity' of the State's 'public assistance programs'. Finally,

the state proceedings provide an adequate opportunity to raise constitutional challenges to the procedures. Plaintiffs have, in fact, raised in the state court proceedings most if not all of the constitutional challenges asserted in this suit.

Plaintiffs assert that the state proceedings are not ongoing, as, after this motion to dismiss was filed, several of the individual plaintiffs' state court suits terminated. However, all of the plaintiffs remain subject to ongoing child support proceedings. See ORS 109.100; 109.103; 107.135. Under Oregon law the child support proceeding continues until the support order is vacated or dismissed. Until that time, either party can file a motion requesting the state court modify the support order. Even if the state

court proceedings were not ongoing, the Ninth Circuit has recognized that Younger abstention is appropriate where the plaintiff seeks to enjoin state officials from enforcing any support order under the existing regulations and procedures.

3. Conclusion

Because the plaintiffs had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," and because "no bad faith, harassment, or other exceptional circumstances dictate to the contrary," this federal court should abstain from interfering with the state court proceedings. Middlesex County at 437.

III. CONCLUSION

Defendant Secretary of Health and Human Service's motion to dismiss should

be granted. Defendants Hunter and Putmans' motion to dismiss should be granted. This action should be dismissed.

Dated this 24 day of April, 1986.

George E. Juba
United States Magistrate

APPENDIX D

CONSTITUTIONAL PROVISIONS

The Supremacy Clause

Article 6, Clause 2, The Supremacy Clause of the United States Constitution, provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken

for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * * *

STATUTORY PROVISIONS IN PERTINENT PART

5 USC § 706. Scope of review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall --

* * * *

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be --

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

* * * *"

28 USC § 1331. Federal Question

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

42 USC § 601. Authorization of appropriations

"For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the

maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 USC § 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

"(a) Contents

"A State plan for aid and services to needy families with children must --

(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

(2) provide for financial participation by the State;

(3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan;

(4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness;

(5) provide such methods of administration * * * as are found by the Secretary to be necessary for the proper and efficient operation of the plan;

* * * * *

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency --

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

* * * * *

(11) provide for prompt notice (including the transmittal of all relevant information) to the State child support collection agency

(established pursuant to part D of this subchapter) of the furnishing of aid to families with dependent children with respect to a child who has been deserted or abandoned by a parent (including a child born out of wedlock without regard to whether the paternity of such child has been established);

* * * * * "

"(26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required --

"(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed;

"(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as

determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; * * *"

42 USC § 653. Parent Locator Service

(a) Establishment; purpose

"The Secretary shall establish and conduct a Parent Locator Service, under the direction of the designee of the Secretary referred to in section 652(a) of this title, which shall be used to obtain and transmit to any authorized person (as defined in subsection (c) of this section) information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent.

* * * * *"

42 USC § 654. State plan for child and spousal support

"A state plan for child and spousal support must --

* * * * *

(4) provide that such State will undertake --

"(A) in the case of a child born out of wedlock with respect to whom an assignment under section 602(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this subchapter determines in accordance with the standards prescribed by the Secretary pursuant to section 602(a)(26)(B) of this title that it is against the best interests of the child to do so, and

* * * * *

"(9) provide that the State will, in accordance with standards prescribed by the Secretary, cooperate with any other State --

"(A) in establishing paternity, if necessary.

* * * * *"

42 USC § 666. Requirement of statutorily prescribed procedures to improve effectiveness of child support enforcement

"(a) Types of procedures required

"In order to satisfy section 654(20)(A) of this title, each State must have in effect laws requiring the

use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

* * * * *

"(5) Procedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday.

* * * * *"

42 USC § 1302. Rules and regulations

"The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."

42 USC § 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the depriva-

tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

REGULATORY PROVISIONS
IN PERTINENT PART

45 CFR § 205.10. Hearings

"(a) State plan requirements. A State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act shall provide for a system of hearings under which:

(1) The single State agency responsible for the program shall be responsible for fulfillment of hearing provisions which shall provide for:

(i) A hearing before the State agency, or

(ii) An evidentiary hearing at the local level with a right of appeal to a State agency hearing. Where a state agency adopts a system of evidentiary hearings with an appeal to a State agency hearing, it may, in some political subdivisions, permit local evidentiary hearings, and in others,

provide for a single hearing before the State agency. Under this requirement hearings shall meet the due process standards set forth in the US Supreme Court decision in Goldberg v. Kelly, 397 U.S. 254 (1970) and the standards set forth in this section."

45 CFR § 206.10. Application, determination of eligibility and furnishing of assistance.

"(a) State plan requirements. A State plan under title I, IV-A, X, IV, or XVI(AABD), of that Social Security Act shall provide that:

* * * * *

"(4) Adequate notice shall be sent to applicants and recipients to indicate that assistance has been authorized (including the amount of financial assistance) or that it has been denied or terminated. Under this requirement, adequate notice means a written notice that contains a statement of the action taken, and the reasons for and specific regulations supporting such action, and an explanation of the individual's right to request a hearing.

* * * * *

"(7) In cases of proposed action to terminate, discontinue, suspend or reduce assistance, the agency shall give timely and adequate notice. Such notice shall comply with the

provisions of § 205.10 of this chapter."

45 CFR § 232.11. Assignment of rights to support.

"(a) The State plan must provide that:

(1) As a condition of eligibility for assistance, each applicant for or recipient of AFDC shall assign to the State any rights to support from any other person as such applicant or recipient may have: * * *"

45 CFR § 232.12. Cooperation in obtaining support.

"The State plan must meet all requirements of this section.

"(a) The plan shall provide that as a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate (unless good cause for refusing to do so is determined to exist in accordance with §§ 232.40 through 232.49 of this chapter) with the State in:

"(1) Identifying and locating the parent of a child for whom aid is claimed;

"(2) Establishing the paternity of a child born out of wedlock for whom aid is claimed;

* * * * *"

45 CFR § 232.43. Proof of good-cause claim.

"The plan shall provide that:

"(a) The State or local agency will make a good-cause determination based on the corroborative evidence supplied by the applicant or recipient only after it has examined the evidence and found that it actually verifies the good-cause claim.

* * * * *

"(g) The State or local agency may further verify the good-cause claim if the applicant's or recipient's statement of the claim required by § 232.40(c)(1)(i), together with the corroborative evidence do not provide sufficient basis for making a determination. When the State or local agency determines that it is necessary, the agency may conduct an investigation of good-cause claims to determine that good cause does or does not exist.

"(h) If it conducts an investigation of a good-cause claim, the State or local agency will:

"(1) Contact the absent parent or putative father from whom support would be sought if such contact is determined to be necessary to establish the good-cause claim; and

"(2) Prior to making such necessary contact, notify the applicant or recipient to enable the applicant or recipient to:

"(i) Present additional corroborative evidence or information so that contact with the parent or putative father becomes unnecessary;

"(ii) Withdraw the application for assistance or have the case closed; or

"(iii) have the good-cause claim denied."

45 CFR § 232.45. Notice to the IV-D Agency

"The plan shall provide that:

"(a) If the notice, required by § 235.70 of this chapter, has previously been provided to the IV-D agency, the State or local agency will promptly report to the IV-D agency that good cause has been claimed;

"(b) The state or local agency will promptly report to the IV-D agency all cases in which it has been determined that there is good cause for refusal to cooperate and if applicable, its determination whether or not child support enforcement may proceed without the participation of the caretaker relative; and

"(c) The State and local agency will promptly report to the IV-D agency all

cases in which it has determined that there is not good cause for refusal to cooperate."

45 CFR § 232.49. Enforcement without the caretaker's cooperation.

"The State plan may provide that:

"(a) If the State or local agency makes a determination that good cause exists it will also make a determination of whether or not child support enforcement could proceed without risk of harm to the child or caretaker relative if the enforcement or collection activities did not involve their participation;

"(b) This determination will be in writing, contain the agency's findings and basis for determination, and be entered into the AFDC case record;

"(c) If the IV-A agency excuses cooperation but determines that the IV-D agency may proceed to establish paternity or enforcement support, it will notify the applicant or recipient to enable such individual to withdraw their application for assistance or have the case closed; and

"(d) Prior to making a determination under this paragraph, the State or local agency will afford the IV-D agency an opportunity to review and comment on the findings and basis for the proposed determination and

consider any recommendation from the IV-D agency."

45 CFR § 233.20. Need and amount of assistance.

"(a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

"(1) General. (i) Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way except where otherwise specifically authorized by Federal statute and * * *"

45 CFR § 235.70. Prompt notice to child support agency.

"(a) A State plan under Title IV-A of the Social Security Act must provide for prompt notice to the State or local child support agency designated pursuant to section 454(3) of the Social Security Act whenever:

"(1) Aid is furnished to a child who has been deserted or abandoned by a parent, to the parent(s) with whom the child lives, or to a pregnant woman under § 233.90(c)(2)(iv), or

"(2) Any of the persons in paragraph (a)(1) of this section is deemed to be

a recipient of aid under § 233.20(a)(3)(viii)(D).

"(b) In this section:

"(1) 'Aid' means Aid to Families with Dependent Children, or AFDC Foster Care.

"(2) 'Prompt notice' means written notice including a copy of the AFDC case record, or all relevant information as prescribed by the child support agency. The prompt notice shall be provided within two working days of the furnishing of aid or the determination that an individual is a recipient under § 233.20(a)(3)(viii)(D). The title IV-A agency and the child support agency may agree to provide notice immediately upon the filing of an application for assistance.

"(3) 'Furnish' means the date on which cash is given to the family, a check or warrant is mailed to the family, a deposit is made in a bank for the family, or other similar circumstances in which an assistance payment is made to the family, or the date on which individuals are determined to be recipients under § 233.20(a)(3)(viii)(D).

"(4) 'A child who has been deserted or abandoned by a parent' means any child whose eligibility for AFDC is based on continued absence of a parent from the home, and includes a child born out of

wedlock without regard to whether the paternity of such child has been established."

45 CFR § 302.31. Establishing paternity and securing support.

"The State plan shall provide that:

"(a) The IV-D agency will undertake:

"(1) In the case of a child born out of wedlock with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective, to establish the paternity of such child; and

"(2) In the case of any individual with respect to whom an assignment under § 232.11 of this title or section 471(a)(17) of the Act is effective to secure support for a child or children from any person who is legally liable for such support, using State laws and reciprocal arrangements adopted with other States when appropriate. Effective October 1, 1985, this includes securing support for a spouse or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under the title IV-D State plan.

"(3) When assigned support payments are received and retained by an AFDC recipient, to proceed as follows:

"(i) In States that implement the IV-A State plan requirements to count retained support payments as income under 45 CFR 233.20(a)(3)(v), the IV-D agency shall notify the IV-A agency whenever it discovers that directly received payments are being, or have been, retained; or

"(ii) In States that do not implement the IV-A State plan requirements to count retained support payments as income to meet need, the IV-D agency shall recover the retained payments. This recovery by the IV-D agency shall be carried out in accordance with the standards for program operations provided in § 303.80 of this chapter.

"(b) Upon receiving notice from the IV-A or IV-E agency that there has been a claim of good cause under § 232.40 of this title, the IV-D agency will suspend all activities to establish paternity or secure support until notified of a final determination by the IV-A or IV-E agency.

"(c) The IV-D agency will not undertake too establish paternity or secure support in any case for which it has received notice from the IV-A or IV-E agency that there has been a finding of good cause pursuant to §§ 232.40 through 232.49 of this title unless there has been a determination by the State or local IV-A or IV-E agency that support enforcement may proceed without the participation of the

caretaker or other relative. If there has been such a determination, the IV-D agency will undertake to establish paternity or secure support but may not involve the caretaker or other relative in such undertaking."

42 CFR § 302.50. Support obligations.

"The state plan shall provide as follows:

"(a) The support rights assigned to the IV-D agency pursuant to § 233.11 of this title or section 471(a)(17) of the Act constitute an obligation owed to the State by the individual responsible for providing such support. Such obligation shall be established by:

"(1) Order of a court of competent jurisdiction,

"(2) Other legal process as established by State laws, such as an administrative hearing process or a legally enforceable and binding agreement; or,

"(3) For cases receiving child support services under the provisions of section 402(a)(17) an (18) of the Act prior to July 1, 1975, the obligation may be that established by an agreement which was entered into prior to July 1, 1975 which does not meet the requirement of paragraph (a)(2) of this section. In the event of a breach of the agreement, such agree-

ment must be superseded pursuant to paragraph (a)(1) or (2) of this section as soon as possible. All agreements not meeting the requirements of paragraph (a)(1) or (2) of this section must be superseded pursuant to paragraph (a)(1) or (2) of this section on the basis of one-third by January 1, 1976, two-thirds by July 1, 1976, and all by January 1, 1977;

"(b) The amount of the obligation described in paragraph (a) of this section shall be:

"(1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or

"(2) If there is no court order, an amount determined in writing by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in § 302.53.

"(c) The obligation described in paragraph (a) of this section shall be deemed for collection purposes to be collectible under all applicable State and local processes.

"(d) Any amounts which represent support payments collected from an individual responsible for providing support under the State plan shall reduce, dollar for dollar, the amount of his obligation under this section.

"(e) No portion of any amounts collected which represent a support obligation assigned under § 232.11 of this title may be used to satisfy a medical support obligation unless the court or administrative order requires a specific amount for medical support."

42 CFR § 303.4. Establishment of support obligations.

"For all cases referred to the IV-D agency or applying under § 302.33 of this chapter, the IV-D Agency must:

"(a) When necessary, establish paternity pursuant to the standards of § 303.5;

"(b) Utilize appropriate State statutes and legal processes in establishing the support obligation pursuant to § 302.50 of this chapter.

"(c) Review the support obligation periodically and whenever the IV-D agency becomes aware of changes in the factors which determine the amount of the support obligation."

42 CFR § 303.5. Establishment of paternity.

"(a) For all cases referred to the IV-D agency or applying under § 302.33 of this chapter in which paternity has not yet been established, the IV-D agency must:

"(1) Attempt to establish paternity by court order or other legal process established under State law; or

"(2) Establish paternity by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity, including the right to benefits other than child support.

"(b) The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.

"(c) The IV-D agency shall identify laboratories within the State which perform legally and medically acceptable tests, including blood tests, which tend to identify the father or exclude the alleged father from paternity. A list of such laboratories shall be available to appropriate courts and law enforcement officials, and to the public upon request."

42 CFR § 303.7. Cooperation with other States.

"(a) For all cases referred to the IV-D agency under the State plan of another State, the IV-D agency must assist the other State in locating an absent parent, establishing paternity, or securing support for a child or

children and for the spouse (or former spouse) of the absent parent with whom the child or children are living in the other State. Under this standard, the IV-D agency must:

"(1) When necessary, locate the putative father or absent parent utilizing the standards prescribed in §§ 303.3.

"(2) When necessary, establish paternity or assist the other State in establishing paternity;

"(3) Process and enforce all court orders referred by another State, whether pursuant to the Uniform Reciprocal Enforcement of Support Act or other legal processes. The IV-D agency shall utilize the same remedies normally applied to its own cases;

* * * * *"

42 CFR §§ 305.24. Establishing paternity.

"For the purposes of this part, in order to be found to be in compliance with the State plan requirement that the State undertake the establishment of paternity (45 CFR 302.31(a) and 302.33), a State must:

* * * * *

"(b) Have established and use written procedures for establishing the paternity of any child at least until the child's 18th birthday: * * * * *"

(2)

No. 87-876

FILED
FEB 16 1988

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONNIE O. KITCHENS, ET AL., PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
FREDDI LIPSTEIN
FELICIA L. CHAMBERS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Due Process Clause requires the Secretary of Health and Human Services to compel states participating in the Aid to Families with Dependent Children (AFDC) program (42 U.S.C. (& Supp. III) 601 *et seq.*) to notify persons that they have been identified in applications for AFDC assistance as the fathers of children born out of wedlock.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bi-Metallic Inv. Co. v. *State Bd. of Equalization*, 239 U.S. 441 (1915)	10
Blum v. *Yaretsky*, 457 U.S. 991 (1982)	12
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	7
Lugar v. *Edmonson Oil Co.*, 457 U.S. 922 (1982)	11, 12
Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950)	10
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	10
Rivera v. *Minnich*, No. 86-98 (June 25, 1987)	7, 9
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947)	10

Constitution, statutes and regulations:

U.S. Const.:	
Amend. V (Due Process Clause)	6, 10, 11
Amend. XIV (Due Process Clause)	10, 11
Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*	10
Social Security Act:	
Tit. IV, Pt. A, 42 U.S.C. (& Supp. III) 601 *et seq.*	1
42 U.S.C. 601	2
42 U.S.C. (& Supp. III) 602(a)	2
42 U.S.C. (& Supp. III) 602(a)(7)(A)	7
42 U.S.C. (& Supp. III) 602(a)(8)(A)(vi)	7
42 U.S.C. (& Supp. III) 602(a)(10)(A)	2

Statutes and regulations – Continued: Page

42 U.S.C. (& Supp. III) 602(a)(11) 2
42 U.S.C. (& Supp. III) 602(a)(26)(A) 2
42 U.S.C. (& Supp. III) 602(a)(26)(B) 2
42 U.S.C. (& Supp. III) 602(a)(27) 3
Tit. IV, Pt. D, 42 U.S.C. (& Supp. III) 651 *et seq.* ... 3
42 U.S.C. (& Supp. III) 654(4) 3
42 U.S.C. (Supp. III) 654(20) 3
42 U.S.C. (& Supp. III) 656 7
42 U.S.C. (& Supp. III) 656(a) 3
42 U.S.C. (& Supp. III) 657(b) 7
42 U.S.C. (& Supp. III) 657(b)(1) 7
42 U.S.C. 662(b) 7
45 C.F.R. 201.0 *et seq.* 2

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-876

RONNIE O. KITCHENS, ET AL., PETITIONERS

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 825 F.2d 1337. The opinion of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A23) was entered on August 20, 1987. The petition for a writ of certiorari was filed on November 14, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Aid to Families with Dependent Children (AFDC) part of the Social Security Act (Title IV, Pt. A of the Act, 42 U.S.C. (& Supp. III) 601 *et seq.*) establishes a

cooperative federal-state assistance program. States participating in the program provide financial support to needy dependent children and the persons who care for them, and the federal government partially reimburses the states for the expenses they thereby incur (42 U.S.C. (& Supp. III) 602(a)). The AFDC program is designed to "encourag[e] the care of dependent children in their own homes * * * and to help [those children's] parents or relatives to attain or retain capability for the maximum self-support and personal independence * * *" (42 U.S.C. 601).

Although participation in the AFDC program is optional, a state that seeks to obtain federal reimbursement for AFDC expenses must formulate and administer an assistance plan that conforms with the requirements of the statute and with the implementing rules and regulations of the Secretary of Health and Human Services (42 U.S.C. (& Supp. III) 602(a); see also 45 C.F.R 201.0 *et seq.*). The state must, for example, provide that "aid to families with dependent children shall * * * be furnished with reasonable promptness to all eligible individuals" (42 U.S.C. (& Supp. III) 602(a)(10)(A)). It must also provide that the appropriate state child-support collection agency will be promptly notified whenever AFDC benefits are furnished to a child who has been deserted or abandoned by a parent, including a child born out of wedlock (42 U.S.C. (& Supp. III) 602(a)(11)). In addition, it must provide that, as conditions of eligibility for aid, each applicant or recipient will be required to assign to the state "any rights to support from any other person such applicant may have * * * which have accrued at the time such assignment is executed" (42 U.S.C. (& Supp. III) 602(a)(26)(A)), and "to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining

support payments for such applicant and for a child with respect to whom such aid is claimed * * *" (42 U.S.C. (& Supp. III) 602(a)(26)(B)). The state must also show that it has in effect a plan approved under the Child Support Enforcement (CSE) program, Title IV, Pt. D of the Social Security Act, 42 U.S.C. 651 *et seq.* (42 U.S.C. (& Supp. III) 602(a)(27)).

The CSE program was added to the Act to encourage states to enforce child-support obligations and thereby to reduce the net cost of assistance programs (such as AFDC). Among other things, it provides that, as a condition of federal funding, states must provide child-support enforcement services for all AFDC applicants and recipients. 42 U.S.C. (& Supp. III) 654(4). It also provides that "[t]he support rights assigned to the State under [the AFDC program] * * * shall constitute an obligation owed to such State by the individual responsible for providing such support" and "[s]uch obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes" (42 U.S.C. (& Supp. III) 656(a)). Finally, it provides that the state must implement expedited judicial or administrative processes for obtaining and enforcing support orders, and, at the state's option, for establishing paternity of putative fathers identified in AFDC applications (42 U.S.C. (& Supp. III) 654(20)).

2. Petitioners are seven individuals who, in applications submitted for benefits under the AFDC program, were identified by the mothers of children born out of wedlock as the children's putative fathers (Pet. App. A2-A3). In October 1985, they filed this lawsuit claiming that the Secretary and the state administrators of Oregon's AFDC and CSE programs had failed to provide them with immediate notice that they had been named as putative fathers in those applications and that, as a consequence,

petitioners had been deprived of property and liberty without due process of law (*id.* at A3-A4, C11). Specifically, petitioners claimed that they had been deprived of the opportunity to contest the level of AFDC assistance provided to their putative children and to avoid having child-support obligations accrue prior to the time the state sought to enforce child-support obligations against them (*id.* at A9). They prayed that the district court declare the extant federal AFDC regulations invalid to the extent that they do not require participating states to notify persons that they have been named as putative fathers in AFDC applications, enjoin the federal and state respondents to promulgate specific regulations providing for such notice, and prohibit the state respondents from collecting any support obligations until such regulations have been promulgated (*id.* at C4). At the time they filed this suit, petitioners were defendants in state court proceedings instituted by the State of Oregon to establish their paternity and, pursuant to an assignment of support rights under the AFDC and CSE programs, to collect substantial back and future child-support payments (*id.* at A3).[1]

3. The district court, adopting the findings and recommendations of a federal magistrate (Pet. App. C1-C32), granted the motions to dismiss of both the federal and state respondents (*id.* at B1-B9). With respect to the federal respondent, the district court found, using "state action" principles as an "analog," that there was "no federal action" that could possibly have given rise to a due process violation (*id.* at B5-B7). The court stressed that

---

[1] Two of the petitioners acknowledged paternity in the state court proceedings; proceedings against two of the other petitioners were dismissed by stipulation of the parties (Pet. 14). The state trial court decisions dismissing proceedings against the remaining three petitioners are on appeal (*id.* at 14-15).

there is no "federal statute or regulation that requires the states *not* to give notice at the AFDC application stage" (*id.* at B6 (emphasis in original)); that "[t]he United States does not coerce or significantly encourage an omission of notice but leaves the notice procedures to the states" (*ibid.*); and that "[t]he federal government has not preempted the entire field, making it impossible for a state to impose its own notice requirements" (*ibid.*). With respect to the state respondents, the court held that, under abstention principles, dismissal in deference to the pending state civil enforcement proceedings was required (*id.* at B8-B9). It reasoned that "[t]he remedy [petitioners] seek is to preclude collection of accrued child support for the prenotice period" (*id.* at B8) and that "[t]his basis for federal relief could have been raised as a partial defense to the state proceedings to [*sic*] which these [petitioners] are or were involved" (*ibid.*).

4. The court of appeals affirmed (Pet. App. A1-A22). Initially, it noted that "[t]he AFDC statute and regulations leave the responsibility for formulating specific procedures for determining paternity and support obligations to the individual states" and that, "therefore, the Secretary asserts, if [petitioners] were deprived of any constitutional rights, the responsibility for that deprivation must fall on the shoulders of the state [respondents]" (*id.* at A9-A10). "In addressing this issue," the court said that " '[t]he standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the strictures of the Fourteenth Amendment' " (*id.* at A10 (citations omitted)). Applying those standards, it held that there was no federal action from which a due process violation could possibly be derived (*id.* at A12-A14). The court stressed that "the entire AFDC scheme is designed to leave the states responsible for the specific procedures to be employed [in the

establishment of paternity and support obligations], subject only to broad parameters outlined in the federal statutes and regulations" (*id.* at A13 (citations omitted)); that "[t]he State of Oregon was and is free to adopt procedures to give timely notice to putative fathers, and there is no evidence that its failure to do so was compelled or encouraged in any way by the Secretary" (*ibid.*); and that the state's failure to provide such notice did not require the Secretary to do so, because " '[m]ere approval of or acquiescence in the initiatives of [the state defendants] is not sufficient to justify holding the [Secretary] responsible for those initiatives * * *' " (*id.* at A13-A14 (citation omitted)). The court also rejected petitioners' argument that "there is a compelling need for national uniformity in this area," stating that "there is nothing in the statutory scheme to indicate a 'clear and manifest' intent on the part of Congress to preempt the entire field" (*id.* at A14 (citation omitted)). Finally, it held that, with respect to the claims against the state respondents, abstention in deference to the pending state-court civil proceedings was appropriate (*id.* at B9).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 20-21, 23-40) is that the failure to notify them that they have been named in AFDC applications as the putative fathers of children born out of wedlock deprives them of due process of law. But this Court has long held that the Due Process Clause attaches only where the government has deprived an individual of a cognizable "property" or "liberty"

interest. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Petitioners have not been deprived of any such property or liberty interest.

Contrary to petitioners' suggestion (Pet. 24-27), they have no constitutionally protected interest in being allowed to contest the level of AFDC assistance provided to their putative children. Any child-support obligation that petitioners may have is determined entirely as a matter of state law (see 42 U.S.C. (& Supp. III) 656, 662(b)), and petitioners cannot claim any legitimate interest in avoiding this obligation. See *Rivera* v. *Minnich*, No. 86-98 (June 25, 1987), slip op. 5 ("[P]utative father[s] [clearly] ha[ve] no legitimate right and certainly no liberty interest in avoiding financial obligations to [their] natural child[ren] that are validly imposed by state law."). To be sure, an AFDC recipient who receives state-mandated child support payments may as a result have his or her AFDC benefits reduced. See 42 U.S.C. (& Supp. III) 602(a)(7)(A), 602(a)(8)(A)(vi), 657(b)(1). But the converse is not true: the receipt of AFDC benefits will not reduce or defeat a child-support obligation imposed by state law. Any such result would be inconsistent with 42 U.S.C. (& Supp. III) 657(b), which provides that child-support payments must be used to offset the financial burden that the Federal Government and the states have assumed under the AFDC program. Thus, there is no basis for claiming that petitioners have a legally cognizable interest in the calculation of their childrens' AFDC benefit levels.[2]

---

[2] Petitioners cannot properly claim (Pet. 27-28) that their own income and resources are relevant in determining the level of AFDC benefits payable to their putative children. Only the income and resources of those in an assistance unit are considered in determining the assistance unit's benefit level. See 42 U.S.C. (& Supp. III) 602(a)(7)(A). By definition, petitioners are not part of the AFDC assistance unit.

Nor is there any basis to petitioners' claim (Pet. 25-27) that they have the right to advance notification of potential child-support obligations so that they can take steps to avoid the accumulation of large past-due support awards. Petitioners concede (Pet. 12-15), as they must, that the state will not establish their paternity or fix their child-support obligations without first providing them with notice and an opportunity for a hearing. Petitioners nevertheless contend that they are entitled to notification as soon as the state learns that a claim of paternity or a support obligation may be asserted against them in the future. But whether or not it would be wise policy to provide notice of potential liability before it is established,[3] petitioners have cited no authority for the proposition that they have a *property* right in receiving such notice. As a general rule, a plaintiff who has an ongoing claim against a defendant may elect either to file periodic actions for damages, or may allow claims to accrue and sue for damages in a lump sum (provided the statute of limitations has not run). Petitioners have cited no decisions holding that exercise of the latter option by the state, as assignee of a valid claim, deprives them of a property right or otherwise gives rise to a due process claim.

---

[3] Petitioners suggest (Pet. 20-21) that advance notification would allow putative fathers to come forward and begin paying their support obligations voluntarily, thereby avoiding the need to pay large lump sums at a later date. But the state could also determine that advance notice might expose mothers or dependent children to retaliation, or might enhance the risk that fathers would leave the jurisdiction or dispose of their assets or take other steps to avoid liability. And the state could also determine that the cost of providing such notice is outweighed by the benefits it would produce, since the state will provide such notice to any father against whom it subsequently determines to proceed, and since a state could reasonably presume that a father who has ignored the foreseeable consequences of his own sexual acts is unlikely voluntarily to assume child-support obligations.

Finally, petitioners contend (Pet. 30) that they have a liberty interest in early notification of their potential support obligations so that they can " 'grasp the opportunity' of parenthood." As an initial matter, we note that this purported interest is somewhat at odds with the relief petitioners seek in this case, which is an injunction against any effort by state officials to enforce petitioners' child-support obligations. Given that petitioners have resisted contributing to the support of their children, even after paternity and child-support proceedings were instituted in state court, they cannot plausibly claim that they are concerned about parenting their children. In any event, this Court has rejected the claim that the existence of a mere biological relationship, without more, is a protectible liberty interest. See *Rivera* v. *Minnich*, slip op. 6 n.7 (citations omitted) (" 'When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," * * * his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." * * * But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.' "). Although two of the petitioners have acknowledged paternity (see n.1, *supra*), the most they assert is a biological link to their children; *none* of the petitioners asserts that he has made any effort to establish a genuine parental relationship with his offspring. Thus, there is no cognizable liberty interest in issue here.

2. Even if petitioners had some conceivable property or liberty interest at stake in the AFDC process, there is, as the courts below held, no basis for suggesting that petitioners are due any process from the Secretary.

Petitioners' basic contention is (Pet. 28-40) that the Due Process Clause of the Fifth Amendment imposes an affirmative obligation on the Secretary to promulgate regulations which in turn impose uniform notice requirements on the states. But petitioners have cited no authority in support of this novel proposition. In cases arising under the Administrative Procedure Act, 5 U.S.C. (& Supp. IV) 551 *et seq.*, this Court has expressed great reluctance to compel agencies to engage in rulemaking, even when it might appear useful that they do so. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). The Due Process Clause, which is primarily concerned with securing the right to fair procedures in individual cases, and not with prescribing rules that apply to large numbers of similarly situated persons, see *Bi-Metallic Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915), is an even more doubtful source of authority for an affirmative duty to engage in rulemaking.

In any event, petitioners' argument overlooks the fact that the Constitution contains two Due Process Clauses, and that the Due Process Clause of the Fourteenth Amendment is fully adequate to ensure that petitioners are afforded adequate procedural safeguards.[4] Here, although Congress has established general requirements that states must observe if they wish to participate in the AFDC program, the actual administration of the pro-

---

[4] Accordingly, petitioners err in asserting (Pet. 38) that federal regulations are required in order to ensure a "uniform and national" notice requirement. The Due Process Clause of the Fourteenth Amendment already imposes a "uniform and national" notice requirement on the states, see, *e.g.*, *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950), and petitioners have not shown how this form of constitutional protection is inadequate to resolve the problems they pose, including notice to putative fathers living outside the forum state.

gram—including specification of the detailed procedures to be followed in naming putative fathers in AFDC applications and in implementing the CSE program—falls to the states. Furthermore, the parental rights and support obligations which are the focus of petitioners' complaint are creatures of state rather than federal law. In these circumstances, any additional procedural safeguards required by due process should be imposed directly on the states through the Fourteenth Amendment, rather than derivatively by the federal government through regulations purportedly required by the Fifth Amendment.

As the lower courts recognized, nothing in the AFDC statute or in the Secretary's regulations stands as an impediment to the assertion of any due process rights that petitioners may have against the state under the Fourteenth Amendment. No "federal statute or regulation * * * requires the states *not* to give notice at the AFDC application stage" (Pet. App. B6 (emphasis in original)); "[t]he United States does not coerce or significantly encourage an omission of notice but leaves the notice procedures to the states" (*ibid.*); "[t]he federal government has not preempted the entire field, making it impossible for a state to impose its own notice requirements" (*ibid.*); and "[t]he State of Oregon was and is free to adopt procedures to give timely notice to putative fathers, and there is no evidence that its failure to do so was compelled or encouraged in any way by the Secretary" (*id.* at A13). In short, as the analogy to "state action" principles employed by the courts below demonstrates, there is no "federal action" here by the Secretary that has deprived petitioners of any procedural protections to which they may be entitled under the Fourteenth Amendment.[5]

[5] A different conclusion does not follow from the "state action" test employed in *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922 (1982). The

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
FREDDI LIPSTEIN
FELICIA L. CHAMBERS
Attorneys

FEBRUARY 1988

"state action" test employed in *Lugar* is the same as the "state action" test employed in *Blum* v. *Yaretsky*, 457 U.S. 991 (1982), upon which the court of appeals in this case relied. Moreover, even under petitioners' formulation of the *Lugar* test—*i.e.*, that "a rule of conduct imposed upon an entity will convert that entity's action into action of the government" imposing the rule (Pet. 42), there is no federal action here that would interfere with petitioners' asserting a due process claim against the states: The Secretary has not imposed a rule on the state barring it from providing notice to putative fathers. For this reason, petitioners also err in suggesting (*id.* at 45-46) that the decision below creates a circuit conflict. The cases cited all involve instances in which a third party has acted in conformity with a government-imposed rule; again, the Secretary has not imposed any such rule on the state in this case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60284